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CRIMINAL PROCEDURE

ACCORDING TO

THE LAW OF SCOTLAND

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BY

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PREFACE TO SECOND EDITION

THE aim of the authors of this volume was to provide a work which would be useful in practice. How well they succeeded in their aim is proved by its popularity. They brought to their task a vast store of practical experience and they were successful in embodying that experience in clear and convenient form. The work is a manual for the use of the ordinary practitioner rather than a textbook of criminal law.

The present editor has maintained its practical character while endeavouring to give it something of the character of a textbook. In pursuance of this policy, some parts of the book have been largely rewritten, a somewhat different arrangement has been adopted, and a larger citation of authority made. The practical elements have been fully maintained and the already extensive supply of forms has been increased.

The development of the Criminal Law has produced a number of changes. The Criminal Appeal (Scotland) Act, 1926, with its elaborate procedure, has added a new chapter to Solemn Procedure. In Summary Procedure considerable changes have been effected by the Criminal Justice Administration Act, 1914; while the provisions of the Summary Jurisdiction Act, 1908, have been elucidated by many decisions.

Exigencies of printing have rendered it necessary to omit the various statutes relating to Criminal Procedure, particularly in view of the passing of the new Acts. This can be no hardship as there are few places in Scotland where the Parliament House Book is not available. A number of Acts of Adjournal are printed in the Appendix.

G. R. T.

EDINBURGH, *August* 1928.



PREFACE TO FIRST EDITION

THE passing of the Summary Jurisdiction (Scotland) Act, 1908, following upon the Criminal Procedure Act of 1887 and the Bail Act of 1888, has produced the nearest approach to a code of criminal procedure that Scotland has yet possessed. The time seems, therefore, appropriate for the preparation of a book which should treat of the whole subject of criminal procedure, apart from the principles of crime. Such a book might be expected not only to be of service to the practitioner, but also to be a convenient means of ascertaining where the law is still defective, with a view to its further amendment.

It has seemed natural that we should collaborate in the preparation of a volume of the character suggested, seeing that we have both already written on the subject of criminal procedure, and have also had the honour of assisting to some extent in the drafting of the recent Act.

Our idea has been to provide a work which will be useful in practice. We have accordingly resisted the temptation to discuss the many interesting historical and jural questions which surround the procedure of our criminal courts, or the curious points which occur in practice rarely and at long intervals. These exceptional points can be studied in the pages of Hume, Alison, and Macdonald, and in the older treatise of Sir George Mackenzie. We have sought rather to gather together all those matters which have to be considered in daily practice in the prosecution and defence of criminal charges, to state them briefly and concisely, and to arrange them in a form convenient for ready reference. We hope that our efforts may be attended with some measure of success; and as our professional brethren know the difficulties inseparable from such an undertaking, we feel that we can rely upon their kindly consideration.

In the matter of forms, we have been liberal in examples illustrating the various steps of procedure, and we trust that in this branch our work will be found to be fairly complete. We have, however, decided not to suggest Forms of Charges in addition to those furnished in the schedules of the statutes, as it seems more prudent, with reference to the new forms introduced by the 1908 Act, to allow some time for experience in actual practice before adapting these to charges not contained in the schedules.

The plan of the book is very simple. It is in three parts—(1) an Introduction applicable to all criminal procedure; (2) Procedure in Solemn Jurisdiction, or trial by jury; and (3) Procedure in

Summary Jurisdiction, or trial without a jury. A Synopsis of Procedure introduces Parts II. and III., and affords a general view of the subject.

A number of illustrative notes have been furnished, containing extracts from important decided cases, with, in many instances, the *ipsissima verba* of the judges. It seemed to us that it would be convenient to have, so far as possible, the exact words of the authorities placed in contiguity to the steps of procedure to which they refer. When a question suddenly arises in court, the prosecutor, or the agent for the defence, is thus able to ascertain readily the decided points. As the 1887 and 1908 Acts have superseded many of the older decisions, we have only referred to such decisions under the former law as seemed still to have a bearing on procedure.

Special pains have been taken with that most necessary portion of a law book—the index. We have sought to make the whole work readily accessible by this means—text, illustrative notes, and appendix. The whole of these have been included in one alphabetical *vidimus*.

In conclusion, we wish to express our thanks to all those who have assisted us by suggestions or by the use of forms. In particular, thanks are due to Mr Agnew, Procurator-Fiscal at Dundee, and Mr Jameson, Procurator-Fiscal at Perth, for furnishing us with various forms of procedure; to Mr W. J. Lewis, S.S.C., Edinburgh, who has not only revised the proof-sheets, but favoured us with many valuable suggestions; and to Mr Alexander Rae, one of the Depute Clerks of Justiciary, who has given us information on many points of practice.

R. W. R.
H. H. B.

EDINBURGH, *May* 1909.

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LIST OF ABBREVIATIONS

I.—ACTS OF PARLIAMENT

1887 Act . . .	The Criminal Procedure (Scotland) Act, 1887.
Bail Act . . .	The Bail (Scotland) Act, 1888.
1908 Act . . .	The Summary Jurisdiction (Scotland) Act, 1908.
1914 Act . . .	The Criminal Justice Administration Act, 1914.
1921 Act . . .	The Criminal Procedure (Scotland) Act, 1921.
1926 Act . . .	The Criminal Appeal (Scotland) Act, 1926.

II.—JUSTICIARY REPORTS

Shaw (Just.) . . .	Shaw's Reports of Cases before the High Court of Justiciary in Scotland	1819-31.
Syme	Syme's	1826-30.
Swin.	Swinton's	1835-41.
Broun	Broun's	1842-45.
Ark.	Arkley's	1846-48.
J. Shaw	J. Shaw's	1848-51.
Irv.	Irvine's	1851-68.
Coup.	Couper's	1868-85.
White	White's	1885-93.
Adam	Adam's	1893-1916.
R. (J.)	Rettie's	Included in Session Cases.
F. (J.)	Fraser's	...
J.C..	Justiciary Cases	1917-25.
S.L.T.	Scots Law Times	1893 (current).
S.C..	Session Cases	1907 (current).

III.—OTHER REPORTS

H.	Hume's Reports of Decisions in the Court of Session in Scotland	1781-1822.
D.	Dunlop's Collection of Decisions in the Court of Session	1838-62.
M.	Macpherson's	1862-73.
R.	Rettie's	1873-98.
F.	Fraser's	1898-1906.
S.L.R.	Scottish Law Reporter	1865-1924.
S.J.	Scottish Jurist Collection of Decisions in the Court of Session	1829-73.
Q.B.	English Law Reports, Queen's Bench Division.	
K.B.	King's Bench Division.	

IV.—AUTHORITIES

- Hume . . . Commentaries on the Law of Scotland respecting Crime, by David Hume.
- Alison . . . Principles and Practice of the Criminal Law of Scotland, by Archibald Alison (1833).
- Macd. . . . A Practical Treatise on the Criminal Law of Scotland, by J. H. A. Macdonald. (Third edition, 1894.)
- Dickson . . . A Treatise on the Law of Evidence in Scotland, by W. G. Dickson. (Third Edition, by P. J. Hamilton Grierson, 1887.)

CRIMINAL PROCEDURE

INTRODUCTION

SECTION I

CRIMINAL JURISDICTION *

1. Crimes and Offences.—A crime is a voluntary act or omission which the Sovereign Power of the State has declared to be punishable.¹ The criminality of an act or omission is not dependent upon the degree of moral guilt which it implies. An immoral offence may not be a crime ; a crime may not be a breach of the moral law. The element which imposes the quality of criminality is a declaration by the Sovereign Power of the State, either implied in its common law, or enacted in its statutes, that if a person does or omits to do a certain act, he will be liable to punishment. The term “ offence ” has a similar but broader signification, and is most frequently applied to breaches of the statute law, designed to regulate the conduct of the citizens in regard to matters of public administration and policy. It is defined by the 1908 Act as an act or attempt or omission punishable by law.²

2. Criminal Jurisdiction.—Criminal Jurisdiction is a power which the Sovereign Authority of the State has vested in a judge, or body of judges, to take cognisance of and determine questions which arise in relation to crimes and offences committed within a specified district or territory. As the term has been extended so as to include proceedings of widely different character, it is sometimes a delicate matter to decide whether the jurisdiction in a particular case is civil or criminal.³ Where it is necessary to consider such questions, it may be laid down as a general rule that the jurisdiction exercised is criminal :—

¹ Stephen, General View of the Criminal Law, p. 1 ; Ersk. Principles, iv. 1.

² § 2.

³ Moncreiff on Review in Criminal Cases, Chap. VI.

- (1) Where the Sovereign Authority of the State authorises proceedings *in vindictam publicam*, for conviction of an offence, and for sentence inferring imprisonment for a period limited to a specified time, at the expiration of which the prisoner is entitled to liberation, although he has not paid any penalty, or done any act, prescribed in the judgment; or
- (2) Where the Sovereign Authority of the State authorises proceedings which are of a criminal character, the person charged to be brought immediately before the Court, and the judgment called a conviction.¹

The result of the trend of modern legislation has been greatly to extend the sphere of Criminal Jurisdiction. In addition to crimes proper and to statutory offences which involve criminal intent, there are many offences created by modern statutes in which a person may become liable to a penalty though he have acted without dole, or may even be punished vicariously for the fault of some one else.

3. Solemn and Summary Jurisdiction.—Criminal Jurisdiction is of two kinds—Solemn and Summary. These are distinguished mainly by the course of procedure which is followed in the trial of a case, and the measure of punishment which follows conviction. Any contravention of the Criminal Law of Scotland must fall into one or other of these categories, and this distinction is of crucial importance. Solemn Jurisdiction is exercised by a judge with the assistance of a jury. The trial proceeds upon an Indictment, and the punishment may extend to penal servitude, and even to death. Summary Jurisdiction is exercised by a judge or judges sitting without a jury. The trial proceeds upon a Complaint, and the punishment cannot exceed a moderate term of imprisonment. In practice, two tests are applied to decide whether a case should be dealt with in a Solemn or Summary manner. The first of these is the statutory direction, if there is any; the other is the gravity of the offence charged. In many instances the Act of Parliament which creates or declares offences prescribes whether they are to be tried on Indictment, or in a Summary manner. In such instances there is no difficulty. As regards the numerous cases which are not so regulated, the matter is left to the discretion of the prosecutor. If the crime is one which can be adequately punished by sentence within the measure of Summary Jurisdiction, the case will be disposed of summarily. If not, it will be tried on Indictment.

4. Original and Appellate Jurisdiction.—All the Criminal Courts in Scotland possess Original Jurisdiction, and are Courts of first instance. The High Court of Justiciary, in addition to its Original

¹ *Stevenson v. Scott*, 1854, 1 Irv. 603; *Bruce v. Linton*, 1861, 24 D. 184.

Jurisdiction, exercises an Appellate Jurisdiction both in Solemn and in Summary procedure. In Solemn procedure the Original Jurisdiction of a single judge sitting with a jury is now, in certain circumstances, subject to an appeal to the High Court of Justiciary sitting as a Court of criminal appeal.¹ In Summary Jurisdiction there are various methods by which proceedings in the Summary Courts may be reviewed in the High Court of Justiciary.²

5. *Locus delicti* the basis of Criminal Jurisdiction.—As a general rule the *locus delicti* determines the particular Criminal Jurisdiction to which a person is amenable. A person charged with a crime or offence is subject to the jurisdiction of any Court which has authority to deal with it in the place where the act or omission is said to have occurred. The jurisdiction of the High Court extends to all Scotland, and in the absence of statutory limitation it can take cognisance of any crime committed in Scotland. The jurisdictions of the Inferior Courts are territorially limited.

Territorial Jurisdiction.—As Criminal Jurisdiction depends primarily on the *locus delicti*, the High Court can take cognisance of any crime committed in Scotland, whether by a British subject or a foreigner.³ This jurisdiction over the whole territory of Scotland extends also to the territorial waters within the three-mile limit, and the Criminal Jurisdiction exercised over ships within these waters appears to be independent of the nationality of the accused or of the ship.⁴ This, however, did not hold in a case where the prosecutor charged a foreigner with being in breach of an international convention to which his State was not a signatory.⁵ But it has been held that a breach of a by-law applicable to the Moray Firth made by the Fishery Board for Scotland could be committed by a foreigner with a foreign vessel where the locus of the offence was beyond the three-mile limit, but within the limits defined by the by-law.⁶ It was observed that the *locus* was *intra fauces terrae*.

Sometimes a crime or offence cannot be definitely attributed to one particular place, but is made up of acts or occurrences taking place in different places. It is not easy to lay down any general rule.⁷ Where the continuous offence is theft or reset, the accused may be charged in any jurisdiction within which he has been found with the stolen property in his possession, or in which part of the offence was committed.⁸ It has been held that there was jurisdiction in Scotland where money was obtained by an Englishman by means

¹ P. 115, *infra*.

² P. 200, *infra*.

³ Macdonald, 247 *sq*.

⁴ *Ibid*.

⁵ *Jensen v. Wilson*, 1912, S.C. (J.) 3;

6 Adam 535.

⁸ *Peters v. Olsen*, 1905, 7 F. (J.) 86,

4 Adam 608; *Mortensen v. Peters*, 1905,

8 F. (J.) 93; 5 Adam 121.

⁷ *Reg. v. Keyn*, 1876, L.R. 2 Ex. D. 63, at 103, 158, 232.

⁸ Macdonald 249; Hume ii. 54; 13 Geo. III. c. 31, §§ 4 and 5; 44 Geo. III. c. 92, §§ 7, 8; 24 & 25 Vict. c. 96, §§ 114, 122.

of fraudulent advertisement in Scotland¹; where a Scots bankrupt uplifted money in England to defraud his creditors,² and in forgery cases where uttering has taken place in Scotland.³ Where a domiciled Englishman, by means of false representations contained in letters addressed by him to traders in Scotland and posted in England, obtained from such traders goods, without paying or intending to pay therefor, it was held that the Scottish Courts had jurisdiction to try the offence.⁴

Exceptions to the rule that Jurisdiction is based on *locus delicti*.—

In the crime of treason, jurisdiction is based on nationality, and the Scots Courts can try British subjects who are charged with treason, no matter where the treasonable acts were committed.⁵ Piracy may be tried by the Scots Courts irrespective of the locus of the offence or of the nationality of the ship or of the offender.⁶ There are also several statutory exceptions to the rule. Under the Coining Act the Scots Courts may try coining offences committed at sea on ships registered at Scottish ports, and a Court which has tried a first offence is given jurisdiction to try a second offence.⁷ Similarly, jurisdiction is given under the Foreign Enlistment Act, 1870,⁸ and the Post Office Act.⁹ The prosecution of offences committed at sea or in foreign ports is now mainly regulated by the Merchant Shipping Act, 1894,¹⁰ §§ 680-710, and the Merchant Shipping Act, 1906,¹¹ § 82. By § 684 of the 1894 Act it is provided that, for the purpose of giving jurisdiction under the Act, every offence is deemed to have been committed either in the place of commission or in the place where the offender is found. Under the provisions of § 686, the Scottish Courts may try (1) a British subject charged with an offence committed on board a British ship (*a*) on the high seas, or (*b*) in a foreign port or harbour; (2) a British subject charged with an offence committed on board a foreign ship to which he does not belong; and (3) a person not being a British subject charged with an offence committed on a British ship on the high seas. Under § 687, the Scottish Courts have power to try British seamen within their jurisdiction who have committed offences at any place either ashore or afloat out of the British dominions.

Illustrations.—An American sailor was charged with assault committed on board an American ship lying in the Clyde. It was

¹ *H.M. Adv. v. Allan*, 1873, 2 Coup. 402.

² *M'Kay*, 1866, 5 Irv. 329.

³ *Hume ii. 53*; *Humphreys*, 1839, *Bell's Notes* 148; *Jeffries*, 1842, 1 Br. 337.

⁴ *H.M. Adv. v. Witherington*, 1881, 8 R. (J.) 41; 4 Coup. 475; *H.M. Adv. v. Bradbury*, 1872, 2 Coup. 311.

⁵ *Hume ii. 50*.

⁶ *Hume i. 480*; *Macdonald* 250.

⁷ 24 & 25 Vict. c. 99, §§ 28 and 36.

⁸ 33 & 34 Vict. c. 90, § 16.

⁹ 8 Edw. VII. c. 48.

¹⁰ 57 & 58 Vict. c. 60.

¹¹ 6 Edw. VII. c. 48.

held that the Sheriff had jurisdiction, as the ship at the time the assault was committed was lying within the Sheriff's territory.¹

A seaman was charged and convicted in absence before the Sheriff Court in Greenock of two contraventions of § 255 of the Merchant Shipping Act, 1854, under a complaint libelling that when engaged on certain ships at Brisbane and Melbourne respectively, he made false statements as to his name. It was held that the Sheriff had jurisdiction under § 520 of the Act.²

Territorial Limits of Jurisdiction in the Inferior Courts.—In cases which fall within the jurisdiction of the High Court there is usually little difficulty, but in cases which fall within the jurisdiction of the Sheriff Court and other Inferior Courts, special considerations arise owing to the fact that the Territorial Jurisdiction of these Courts is limited. When proceedings are brought in an Inferior Court there must be sufficient specification of the *locus delicti* in the indictment or complaint to determine the jurisdiction of the Court.³

Special statutory provisions are made to meet two cases⁴:—(1) where the crime may fall within the ambit of two separate jurisdictions; and (2) where the crime is committed on the boundary of two jurisdictions.

Where two Jurisdictions are involved—

- (1) Where a crime has been committed partly in one county and partly in another county; or
- (2) Where one crime following on and connected with another crime has been committed in a different county from that in which the first was committed; or
- (3) Where several crimes which, if committed in one county, could be tried under one Indictment are alleged to have been committed by any person in different counties in succession, a person accused may be lawfully indicted to a Court to be held in such one of such counties as shall be determined by the Lord Advocate.⁵

Where there are charges against an accused person in different counties, he may be brought before the Sheriff of any one of such counties, at the instance of the Procurator-Fiscal of such county, for examination on all or any of such charges, and may be dealt with in every respect as if such charges had arisen in the county where he is examined, but without prejudice to the power of the Lord Advocate, under the foregoing section, to determine the Court before which the accused shall be tried on such charges.⁶

¹ *Lewis v. Blair*, 1858, 3 Irv. 16.

² *Simpson v. Board of Trade*, 1892,

19 R. (J.) 66; 3 White 167.

³ *M'Millan v. Grant*, 1924, J.C. 13.

⁴ 1887 Act, § 22; Macdonald 247.

⁵ 1887 Act, § 22.

⁶ 1908 Act, § 77 (2).

In the second place, difficulties as to jurisdiction arise where a crime had been committed on the boundary of two jurisdictions. Such questions are obviated by the following enactments :—

- (1) Where an offence is committed in any harbour, river, arm of the sea, or other water (tidal or other) which runs between or forms the boundary of the jurisdiction of two or more Courts, such offence may be tried by any one of such Courts.
- (2) Where an offence is committed on the boundary of the jurisdiction of two or more Courts, or within the distance of 500 yards of any such boundary, or partly within the jurisdiction of one Court and partly within the jurisdiction of another Court or Courts, such offence may be tried by any one of such Courts.
- (3) Where an offence is committed on any person, or in respect of any property in or upon any carriage, cart, or vehicle whatsoever employed in a journey by road or railway, or on board any vessel whatsoever employed in a river, lake, canal, or inland navigation, such offence may be tried by any Court through whose jurisdiction such carriage, cart, vehicle, or vessel passed in the course of the journey or voyage during which the offence was committed. Where the side, bank, centre, or other part of the road, railway, river, lake, canal, or inland navigation along which the carriage, cart, vehicle, or vessel passed in the course of such journey or voyage is the boundary of the jurisdiction of two or more Courts, such offence may be tried by any one of such Courts.
- (4) Where several offences, which if committed in one county could be tried under one indictment or complaint, are alleged to have been committed by any person in different counties, the accused may be tried for all or any of said offences under one indictment or complaint before the Sheriff of any one of such counties.
- (5) Where an offence is authorised by this section to be tried by any Court it may be dealt with, heard, tried, determined, adjudged, and punished as if the offence had been wholly committed within the jurisdiction of such Court.¹

Illustration.—A Glasgow bookmaker sent by post from Glasgow, cards to persons in Dundee inviting them to bet. He was charged in the Sheriff Court at Forfar with a contravention of the Betting Acts. It was held that there was jurisdiction both at common law and under § 10 (4) of the 1908 Act.²

¹ 1908 Act, §§ 10 and 77 (4).

² *Lipsey v. MacKintosh*, 1913, S.C. (J.) 104; 7 Adam 182.

SECTION II

CRIMINAL COURTS

It has already been pointed out that Criminal Jurisdiction may be either original or appellate. Appellate Jurisdiction is the prerogative of the High Court of Justiciary, which performs the function of a Court of Criminal Appeal in cases falling under Solemn procedure, and the function of a Court of Review in cases falling under Summary procedure. These two functions of Appellate Jurisdiction and of Review will be considered subsequently.¹ The present section is devoted to the Criminal Courts of first instance. Original Criminal Jurisdiction is exercised in Scotland by six classes of Court. These are divided into Superior and Inferior. The Superior Court is the High Court of Justiciary. The Inferior Courts are those of the Sheriff, Justices of the Peace, Burgh Magistrates, Police Magistrates, and the Bailie of the River Clyde.

1. High Court of Justiciary.—*Constitution of the High Court.*—The High Court of Justiciary sits in Edinburgh, and also on circuit in various parts of Scotland. It consists of thirteen Senators of the College of Justice, who are, in virtue of their appointment as such, Lords Commissioners of Justiciary in Scotland.² As a general rule, only one judge sits at a trial; but in cases of special importance two or more, usually three, may sit.³ Where points of particular difficulty arise, the presiding judge may certify the case for the opinion of the whole Court. In such circumstances the case is heard before three or more judges.⁴

Sittings.—The determination and arrangement of circuits is now vested in the Lords Commissioners of Justiciary who, after consultation with the Lord Advocate, may deal with these matters by Act of Adjournal.⁵ The Lords Commissioners of Justiciary hold such sittings for the trial of criminal causes as may be necessary, on the requisition of the Lord Advocate. Every sitting of the Lords Commissioners is a sitting of the High Court of Justiciary.⁶

Scotland is divided for judicial purposes into four districts—

¹ Pp. 115, 200. The appeal under the Motor Car Act, 1903, is exceptional; see p. 224.

² 1887 Act, § 44.

³ 31 & 32 Vict. c. 95, § 1.

⁴ Macdonald 253.

⁵ Circuit Courts and Criminal Procedure (Scotland) Act, 1925, § 1.

⁶ *Ibid.*, § 3.

Home, West, North, and South. These comprehend the following counties :—

(1) HOME—Edinburgh, East Lothian, West Lothian, and Peebles.

(2) WEST—Lanark, Renfrew, Bute, Stirling, Dumbarton, Clackmannan, Kinross, Argyle.

(3) NORTH—Perth, Fife, Angus, Aberdeen, Banff, Kincardine, Inverness, Ross and Cromarty, Elgin, Nairn, Sutherland, Caithness, Orkney and Zetland.

(4) SOUTH—Ayr, Dumfries, Kirkcudbright, Wigtown, Roxburgh, Berwick, and Selkirk.

For these districts Courts are usually held in the following places :—

HOME—Edinburgh.

WEST—Glasgow, Stirling, and Inveraray.

NORTH—Inverness, Aberdeen, Dundee, and Perth.

SOUTH—Dumfries, Jedburgh, and Ayr.

Although these are towns in which the High Court has been wont to sit, it is not restricted to these. It may hold a Court in any town which may be most convenient for the trial of any crime, in or near the locality in which such crime has been committed.¹

On the other hand, it is not necessary that a Circuit Court should be held when there is no business to be done. It is not necessary for the High Court of Justiciary to proceed to any town for the purpose of holding any Court in use to be held in such town, when there are no cases indicted for the sitting of the Court at such town, or when so many of the persons indicted thereto have pleaded guilty before the Sheriff at the first diet as to make the holding of a Special Court inexpedient.²

If a number of cases have been set down for the sitting of the High Court of Justiciary, and so many of the persons who have been indicted have pleaded guilty at the first diet as to make unnecessary the holding of a separate Court for the cases remaining, it is lawful for any Lord Commissioner of Justiciary, on the petition of the Lord Advocate, presented within three days immediately succeeding the first diet, and in chambers, and without the presence of the prosecutor or person accused, to order the second diets of such cases to be postponed, and to be held at any sitting of the High Court of Justiciary about to be held in any adjacent county, or any county in the same district of the country, or in Edinburgh.³

Where any crime is committed in any county of an existing circuit in which no sitting of the High Court of Justiciary falls to be held in ordinary course for some months thereafter, it is competent to cite the person accused to compare before the High Court of

¹ 1887 Act, § 47.

³ *Ibid.* § 50.

² *Ibid.* § 48.

Justiciary at any sitting which is to be held sooner in Edinburgh, or in another county being in a circuit district adjacent to the first-mentioned county.¹

Powers of the High Court.—The High Court, as a Court of first instance, exercises Solemn Jurisdiction only. Its jurisdiction to try all crimes committed within Scotland is practically universal, and is excluded only where a particular Court is fixed by statute for the trial of certain offences. The exclusion of the High Court must be expressed or necessarily implied.²

The High Court has an inherent power to punish every act which is obviously of a criminal nature, though it be such as in time past has never been the subject of prosecution.³ The High Court also has the exclusive power of providing a remedy for all extraordinary or unforeseen occurrences in criminal business.⁴ This power is similar to the *nobile officium* of the Court of Session. It has been held that this power can be exercised only by a quorum of the Court, and not by a single judge.⁵

The High Court has power to make rules and regulations by Act of Adjournal for the conduct of criminal proceedings.⁶

Exclusive Jurisdiction.—The High Court has Exclusive Jurisdiction in cases of treason; murder, rape, deforcement of messengers, breach of duty by magistrates, corrupt disclosure of official secrets, and in all cases where a higher degree of punishment than imprisonment is imposed by statute.⁷ Special statutory provision is made for the crime of treason.

2. The Sheriff Court—Its Jurisdiction, both Solemn and Summary.—The Sheriff Court alone exercises both Solemn and Summary Criminal Jurisdiction. In Solemn procedure the Sheriff or his substitute sits with a jury; in Summary procedure he sits alone.

Limitations of the Sheriff's Jurisdiction.—The Solemn Jurisdiction of the Sheriff is limited by the fact that he cannot award penal servitude or any higher punishment than imprisonment which is, in practice, limited to two years. Consequently, no cases are remitted for trial by Sheriff and jury except those for which such a sentence

¹ 1887 Act, § 51.

² *H.M. Adv. v. Rowet*, 1843, 1 Br. 540; *H.M. Adv. v. Robertson*, 1844, 2 Br. 176; *H.M. Adv. v. Duncan*, 1864, 4 Irv. 474.

³ Hume i. 12; *Greenduff*, 1838, 2 Swin. 236; *H.M. Adv. v. Coutts*, 1899, 3 Adam 50, at 59; *H.M. Adv. v. Sweeney*, 1858, 3 Irv. 109; *Strathern v. Seaforth*, 1926, J.C. 100.

⁴ Alison ii. 23; *Smith v. Ritchie & Co.*, 1892, 20 R. (J.) 52; 3 White 408.

⁵ *Lowson v. H.M. Adv.*, 1909, 2 S.L.T. 329.

⁶ 1887 Act, § 76; Bail Act, 1888, § 10; 1908 Act, §§ 16 and 74; 1926 Act, § 15.

⁷ Macdonald 252. It has not been decided what effect §§ 43 and 77 (4) of the 1908 Act have on the jurisdiction of the Sheriff.

would be adequate. The limitations of the Sheriff's Summary Jurisdiction are set forth later.¹

Territorially, the authority of the Sheriff Court is limited to the district for which it exists—a county, a combination of counties, or part of a county. There are exceptions in the case of continuous crimes² and of crimes in reference to which the Sheriff of the place of apprehension has jurisdiction by statute.³ The special rules laid down in the 1908 Act in regard to crimes involving separate jurisdictions, or to crimes committed on the boundaries of two jurisdictions, have already been mentioned.⁴ But the Sheriff frequently tries persons who are charged with crimes committed beyond his jurisdiction when they are remitted to him for trial by the Lord Advocate under § 22 of the 1887 Act.

The jurisdiction of the Sheriff Court is further limited by the fact that certain crimes may be tried in the High Court only.⁵

Jurisdiction of the Sheriff Court universal.—Apart from these limitations, the jurisdiction of the Sheriff Court is universal in contradistinction to the other Inferior Courts, on which jurisdiction must be expressly conferred.⁶ The Sheriff has, by statute,⁷ a concurrent jurisdiction with every other Court within his sheriffdom in regard to all offences which can be competently tried in such Courts.

Illustration.—A person was brought before a magistrate in a Police Court on a charge under the Motor Car Act, 1903, and convicted. It was objected that the offence created by the Act was a new one, and that no jurisdiction was conferred on the magistrates of Police Burghs. It was held that as jurisdiction was not expressly conferred on Police Courts, the conviction must be suspended. Lord Justice-General Dunedin said: "I have always understood it to be the law of Scotland that, in the case of statutory offences, which are not offences at all until they are created so by statute, the jurisdiction must be specially conferred on any Courts which have not Universal Jurisdiction, and the only Courts which have Universal Jurisdiction are the Sheriff Court and this Court."⁸

3. Justice of Peace Courts.—Justices of the Peace can only exercise Summary Criminal Jurisdiction, mostly in petty charges at common law and under statute relating to excise, roads, licensing,

¹ P. 134.

² P. 3, *supra*; Macdonald 256.

³ Macdonald 257; 17 & 18 Vict. c. 104, § 531; 18 & 19 Vict. c. 91, § 21.

⁴ P. 5, *supra*.

⁵ P. 9, *supra*.

⁶ See observations by Lord M'Laren on the elements to be considered in

determining whether the Sheriff's jurisdiction does or does not embrace a new statutory offence. *Clark and Bendall v. Stuart*, 1886, 13 R. (J.) 86, 1 White 11.

⁷ 1908 Act, § 11.

⁸ *M'Pherson v. Boyd*, 1907, S.C. (J.) 42, 5 Adam 247.

and the like.¹ Their authority extends to the county, or county of a city, for which they are appointed. Prosecutions before them are conducted by the Justice of Peace Fiscal, or by public officials. Their decisions are subject to appeal to Quarter Sessions, and also to review by the High Court and Court of Exchequer. In Quarter Sessions the whole case is reviewed both on fact and law; in other appeals only on questions of law.

The Sheriff has a concurrent jurisdiction with the Justices of the Peace within his sherriffdom, in regard to all offences competent for trial by them.²

4. Burgh and Police Courts.—The Courts established in various Royal, Parliamentary, and Police Burghs, and also the Court of the Bailie of the River Clyde,³ may be grouped together. Their authority is limited to particular boundaries. They exercise Summary Criminal Jurisdiction only, and their powers of punishment are limited. In each Court there is a public prosecutor, usually called in the Burgh Court the “Burgh Prosecutor,” although he has been termed incorrectly the “Burgh Fiscal.” The decisions of these Courts are subject to appeal to the High Court of Justiciary on points of law.

It has to be observed that the Sheriff, Justices of Peace, Burgh Magistrates, Dean of Guild, and Police Magistrates have within burghs which have adopted the general Police Act concurrent jurisdiction under the Burgh Police (Scotland) Act, 1892, §§ 508 and 509, and the 11th section of the 1908 Act. The effect of this concurrent jurisdiction is important. By means of it a case may be tried in any of these Courts, provided that it has been in the first instance brought before or taken up by the said Court.⁴ If proceedings have been taken in one of these Courts, the case cannot be taken up in another, except under the special circumstances in which the magistrates are required or permitted to remit cases to the Sheriff, by virtue of the 8th and 9th sections of the 1908 Act.

It has been held by a full bench that the procedure in the Dean of Guild Court is of a civil nature, and a conviction following on a Summary criminal complaint in that Court was set aside.⁵

¹ As, for example, *Tasker v. Simpson*, 1904, 7 F. (J.) 33; 4 Adam 495 (Licensing Act, 1903); *Lamb v. Threshie*, 1892, 19 R. (J.) 78; 3 White 261 (Lotteries Act, 1823).

² 1908 Act, § 11.

³ *Clelland v. Sinclair*, 1887, 14 R. (J.) 23; 1 White 359.

⁴ *Cameron v. M'Niven*, 1894, 21 R. (J.) 31; 1 Adam 346.

⁵ *Angus v. Jeffray*, 1909, 46 S.L.R. 388.

SECTION III

DUTIES OF A PROSECUTOR IN CONSIDERING WHETHER A CRIMINAL CHARGE SHOULD BE MADE

BEFORE one can decide as to whether Criminal Jurisdiction ought to be invoked in a particular case, several matters have to be taken into consideration. Information of a criminal charge is usually lodged with the prosecutor in writing, more or less formal. It may be lodged verbally, but a prosecutor will seldom venture to proceed upon verbal information.

No good purpose would be served by minutely discussing the particulars which should guide the prosecutor in his consideration of the information thus lodged with him. Each has his own way of approaching the question, and for himself his own method is the best. Nevertheless, it will be convenient to note here a few points to which attention ought always to be paid :—

- (1) Whether the facts disclosed in the information constitute either a crime according to the common law of Scotland, or a contravention of an Act of Parliament which extends to that country.
- (2) Whether there is sufficient evidence in support of these facts to justify the institution of criminal proceedings.
- (3) Whether the act or omission charged is of sufficient importance to be made the subject of a criminal prosecution.
- (4) Whether there is any reason to suspect that the information is inspired by malice or ill-will on the part of the informant towards the person charged.
- (5) Whether there is sufficient excuse for the conduct of the accused person to warrant the abandonment of proceedings against him ; and
- (6) Whether the case is more suitable for trial in the civil Court, in respect that the facts raise a question of civil right.

Having made up his mind that the case is one in which criminal proceedings ought to follow, the prosecutor has next to consider whether these proceedings fall into Solemn or Summary Jurisdiction. The mode of finding an answer to this query has been already indicated. If an Act of Parliament prescribes that a particular crime or offence is to be prosecuted on Indictment, the jurisdiction is

Solemn ; if it is to be prosecuted summarily, the jurisdiction is Summary. When there is no statutory ruling on the subject, the decision depends upon the gravity of the offence. The prosecutor is aware of the limits of punishment in Summary Criminal Jurisdiction, and if the competent penalty would not meet the justice of the case he must adopt Solemn procedure.

The prosecutor's decision as to whether the case falls into Solemn or Summary Jurisdiction usually settles any question as to the Court of trial. Cases falling under Solemn Criminal Jurisdiction can only be tried before the High Court of Justiciary, or the Sheriff and a jury. Cases falling under Summary Criminal Jurisdiction may be tried before the Sheriff, Justice of Peace, Burgh, and Police Courts. Each of these Courts has its fixed limits of jurisdiction, known to the prosecutor, and it is generally a simple matter to decide what Court has jurisdiction to try the offence. In statutory charges, the Act of Parliament which creates the offence not unusually names the Court which is to try it.

Great care must be taken to make sure that the person accused is subject to the jurisdiction of the Court. The guiding principle, as we have said, is the *locus delicti*. A person charged with a crime or offence is subject to the jurisdiction of any Court which has authority to deal with it in the place where the act or omission is said to have occurred. Some Acts of Parliament provide that the person who contravenes their provisions is liable to prosecution either at the place where the offence was committed or at the place where he was found. In continuous offences such as theft, reset, or fraud, the accused person may be tried in any jurisdiction within which he is found with the stolen property in his possession, or in which part of the offence was committed. There is also special provision for the trial of offences committed on the boundary of two jurisdictions, or in similar circumstances. These and other extensions have to be borne in mind.

It is necessary to observe carefully the distinction between crimes or offences at common law and those under statute. The elements necessary to constitute all crimes recognised at common law are now well defined. The prosecutor, before he institutes proceedings, requires to be satisfied that the facts which he proposes to prove will establish the points necessary for the constitution of the crime charged. The form of procedure which he is to adopt, and the Court before which he is to prosecute, are easily settled upon broad principles which give little trouble in practice.

Statutory charges are in a different position. Such an offence is the creature of statute, and its characters are bounded by the enacting words. Those enactments are often materially affected by repeals and re-enactments, so that the prosecutor has to be cautious lest he overlook a portion of the legislation on the subject. In each

case he must satisfy himself as to the mode of procedure, the Court, the punishment, and the application of any penalty imposed, because the enactments on these heads differ widely in different statutes.

Having fortified himself by a complete study of the information submitted to him, the prosecutor is ready to formulate his charge, and to invoke the authority of the Criminal Courts.

PART I

SOLEMN CRIMINAL PROCEDURE

OR

PROCEDURE BY INDICTMENT

SYNOPSIS OF PROCEDURE

TABLE I.—SHERIFF AND JURY TRIAL WHEN ACCUSED IN PRISON

BRANCH 1.—BOTH DIETS IN SAME COURT

1926.

Monday,	June	7.	Petition and warrant to arrest issued (§ 16).
Tuesday,	„	8.	Declaration (if desired by accused) and committal for further examination (§ 17).
Wednesday,	„	16.	Committal for trial. Should as a general rule be within eight days from declaration.
Monday,	„	21.	Case reported to Crown Office. No fixed period for this, but should be as early as possible after committal for trial.
Thursday,	„	24.	Case returned for trial by Sheriff and jury.
Friday,	„	25.	Indictment prepared by P.F. First and second diets arranged for.
Monday,	„	28.	Warrant of citation of accused, witnesses, and jurors obtained from Sheriff Clerk (§ 23).
Tuesday,	„	29.	Indictment served (§§ 24 and 26). Indictment and extract convictions lodged with Sheriff Clerk (§ 27). Jury list made up by Sheriff Clerk (§ 38). Accused entitled on application to have copy supplied free of charge.
„	July	6.	First diet (six clear days after service). Any objections to relevancy, etc., to be stated and minute signed by Clerk stating that such objections sustained or repelled (§§ 28, 32, 33 ; Act of Adjournal, March 1827, c. 5, § 3).
Tuesday,	„	6.	Any special defence tendered and recorded (§ 36). <i>Note.</i> —A special defence may be lodged not later than two clear days before second diet, if accused can at that diet show cause to the satisfaction of the Court for such defence not being lodged at first diet (§ 36). Plea of not guilty recorded and signed by Sheriff (§ 28).
Saturday,	„	10.	Last day (five clear days before second diet) for giving written notice to P.F. of any challenge of previous convictions libelled (§ 66).

Note.—The sections referred to are those of the 1887 Act, unless where otherwise stated.

1926.

- Saturday, July 10. Last day (four clear days before second diet, and following day being Sunday) for notifying P.F. of inability to find any person or witness named in Indictment (§ 53).
- Monday, ,, 12. Last day (three clear days before second diet) for giving written notice to P.F. of witnesses for and productions for defence (§ 36).
Copies of written notices to be lodged with Clerk (§ 36).
Note.—If before jury sworn accused can show that he was unable to give full three days' notice in regard to any witness or production, the Court may permit such witness to be examined or production put in, but shall give such remedy to prosecutor by adjournment or postponement of trial or otherwise as shall seem just (§ 36).
- Thursday, ,, 15. Last day (day before trial) for lodging productions for prosecution and defence with Clerk of Court (Act of Adjournal, 1827, c. 2, § 6, and c. 4, § 2).
- Friday, ,, 16. Second diet (nine clear days after first diet). Trial.
Prisoner intimates adherence to plea of not guilty (9 Geo. IV. c. 29, § 12; 16 & 17 Vict. c. 80, § 34).
Jury balloted—five special, ten common. Prosecutor and accused each five challenges, of which not more than two can be of special jurymen (6 Geo. IV. c. 22, § 16).
Clerk states charge (omitting reference to previous convictions), reads also any special defence, and swears jury (§ 54, § 67, sched. P.).
Evidence for prosecution led.
,, for defence.
Speeches for prosecution and defence.
Judge sums up.
Verdict and sentence (§ 57). Sheriff may remit to High Court for sentence (1921 Act, § 2).

BRANCH 2.—FIRST DIET IN DIFFERENT COURT FROM THAT OF SECOND DIET

Procedure same as in Br. 1 up to service of Indictment.

- Tuesday, June 29. Indictment served (§§ 24 and 26).
Indictment and extract convictions lodged with Clerk of Court of first diet, and copy Indictment lodged with Clerk of Court of second diet (§ 38).
Jury list, etc., as in Br. 1.
- Tuesday, July 6. First diet (in Sheriff Court nearest to prison where accused confined) (§ 26).
Procedure same as at first diet in Br. 1, with the following modifications :—
(a) The P.F. of the district of the first diet acts as representing His Majesty's Advocate, unless an A.D. or P.F. of district of second diet appears to prosecute (§ 28).

1926.

- Tuesday, July 6. (b) The clerk records any interlocutor signed and plea tendered not only on the Indictment but also "in the books of court" of the first diet or "in a record to be kept for the purpose."
- (c) Immediately after the first diet the clerk transmits the Indictment and extract convictions to the Clerk of the Court of the second diet.
- Procedure thereafter the same as in Br. 1.

TABLE II.—SHERIFF AND JURY TRIAL WHERE ACCUSED IS LIBERATED ON BAIL.

(BAIL ACT, 1888)

1926.

- Monday, June 7. Petition and warrant to arrest issued (§ 16).
- Tuesday, „ 8. Declaration (if desired by accused) and committal for further examination (§ 17).
Application for bail may be made at this stage.
Accused has no right of appeal against refusal or amount fixed, but P.F. has right of appeal (Bail Act, § 5).
- Wednesday, „ 16. Committed for trial.
Note.—If accused liberated on bail prior to this, he may be indicted without being committed for trial (§ 18).
Application for bail made and granted.
The Bail Act contains the following provisions :—
- (a) Application must be disposed of within twenty-four hours from presentation of petition, otherwise accused is entitled to liberation (§ 2).
 - (b) Amount of bail to be sufficient in opinion of magistrate to secure accused's appearance at all diets (§ 4).
 - (c) Either party may appeal against deliverance—the accused in respect of the refusal of bail, or the amount being excessive; the prosecutor in respect of the granting of bail, or the amount being inadequate (§ 5).
 - (d) The appeal is disposed of by the High Court or any Lord Commissioner of Justiciary in Court or in chambers.
 - (e) When the prosecutor appeals, the accused, if he has found bail, must be liberated after 72 hours (or in the Outer Hebrides or Orkney and Shetland, 96 hours) from the time of his application being granted, unless his further detention is ordered by the High Court pending consideration of the appeal. In computing hours, Sundays, public fasts, and general or Court holidays are not included.

1926.
 Wednesday, June 16. Procedure after bail has been found will be as in Table I., Br. 1, except that service will be at the domicile of citation as fixed in accused's bail bond; and if he fails to appear either at the first or second diet or any other diet fixed for his appearance his bail will be forfeited and warrant granted for his apprehension.

TABLE III.—SHERIFF AND JURY TRIAL WHERE ACCUSED PLEADS GUILTY AT FIRST DIET

BRANCH 1.—BOTH DIETS IN SAME COURT

Procedure the same as in Table I, Br. 1, up to the first diet.

1926.
 Tuesday, July 6. First diet.
 Plea of guilty tendered, recorded, and signed by prisoner and judge.
 Sentence pronounced then or at adjourned diet.
Note.—If previous convictions challenged, accused must give written notice of such challenge to P.F. by 3rd July (two clear days before first diet), and P.F. may at such diet lead proof of such convictions, and accused may lead rebutting evidence (§ 66).

BRANCH 2.—FIRST DIET IN DIFFERENT COURT FROM THAT OF SECOND DIET

Procedure the same as in Table I., Br. 1, up to the first diet.

- Tuesday, July 6. First diet (§ 28).
 Plea of guilty recorded and signed by accused and Sheriff.
 Sentence pronounced then or at adjourned diet; or
 Case may be adjourned to second diet in order that the Sheriff of the Court of that diet may pronounce sentence (§ 28, sched. H.).
 The rest of the procedure at the first diet will be as set forth in Table I., Br. 2.
 As to challenge of previous convictions, see note to Br. 1, *supra*.

TABLE IV

PLEA UNDER SECTION 31

1926.
 Monday, June 7. Petition and warrant to arrest (§ 16).
 Tuesday, „ 8. Declaration (if desired by accused) and committal for trial (§ 17).
 Letter from agent of accused addressed to Crown Agent (but given to P.F.), stating that accused intends to plead guilty and desires his case to be disposed of in terms of § 31 as early as possible.
 Case transmitted to Crown Agent, with short report on facts of case.

1926.

- Wednesday, June 9. Case returned to be proceeded with under § 31.
 Indictment prepared. (No list of witnesses or productions other than productions to prove previous convictions.)
 Indictment served, with notice attached in terms of sched. L. (No warrant of citation required.)
- Monday, „ 14. Diet for plea (at least four clear days after service).
 Plea recorded and signed by accused and Sheriff.
 If any challenge of previous convictions, two clear days' notice must be given, and the procedure will be as set forth in Table III., Br. 1.
 Sentence will be pronounced by Sheriff, unless from the nature of the case he thinks it desirable or necessary to remit the case to the High Court for sentence, in which case an interlocutor in terms of sched. M. will be written on the Indictment.
 If the case falls to be disposed of in a Court different from that in which the accused was committed for trial, the procedure will be as above ; and if sentence is pronounced in the Sheriff Court, the procedure will as nearly as may be follow that set forth in Table III., Br. 2.

TABLE V

CASE TRIED IN HIGH COURT OF JUSTICIARY

Procedure the same as in Table I., Br. 1, up to date when case reported to Crown Office. If bail is applied for, Crown Counsel should be consulted thereon.

1926.

- Monday, June 28. Indictment drafted by Crown Counsel.
- Friday, July 2. Proof print sent to P.F. for revisal.
- Monday, „ 5. Proof print returned revised.
- Friday, „ 9. Warrant of citation issued by Clerk of Justiciary (§ 23, sched. B.).
- Monday, „ 12. Indictment served.
 List of jury prepared under directions of Clerk of Justiciary, and kept in office of Sheriff Clerk of second diet.
 Indictment and documentary productions lodged with Sheriff Clerk of Court of first diet (§ 27).
Note.—If accused indicted for fugitation, copy Indictment will be lodged with Clerk of Justiciary (§ 27).
 Other productions may either be lodged with clerk of first diet, or retained in district to which the case belongs, as may be most convenient for parties interested.

1926.

Monday, July 19. First diet (§ 29).

Procedure similar to that in Table I., Br. 1; but—

- (a) If plea of guilty in whole or in part tendered, it will be dealt with at second diet, and sentence then pronounced.
- (b) If accused on bail and fails to appear, this will be minuted, but the forfeiture of his bail bond will be dealt with at second diet, and sentence of fugitation then pronounced.
- (c) If any objections to relevancy, etc., stated which Sheriff considers should be reserved for the consideration of the High Court, he endorses on Indictment certificate in terms of sched. K. Copy of this certificate kept in books of Court or in record kept for the purpose.
- (d) Immediately after first diet Indictment and documentary productions will be transmitted to Clerk of Justiciary; other productions will also be then lodged with him, if trial is to be in Edinburgh; or if at a circuit town, in the office of the Sheriff Clerk of that town.

Friday, „ 23. Last day (five clear days before trial) for notice to Crown Agent of challenge of previous convictions (§ 66).

Saturday, „ 24. Last day (four clear days before trial) for notice to Crown Agent of inability to find any person or witness mentioned in Indictment (§ 53).

Last day (three clear days before trial, allowing for Sunday intervening) for notice to Crown Agent of witnesses and productions for defence (§ 36).

Copies of all written notices to be lodged with Clerk of Justiciary for use of Court.

See note, Table I., Br. 1.

Thursday „ 29. Second diet. Trial.

Transcript made of procedure at first diet in books of Court or in a record to be kept for the purpose.

Other procedure same as at second diet in a Sheriff and jury trial. See Table I., Br. 1.

CHAPTER I

PROSECUTORS AND THEIR TITLE

IN Solemn procedure there are two types of prosecutor—the public and the private. Private prosecution on Indictment is of very rare occurrence.

Public Prosecutors.—The prosecution of crime in Scotland is in the hands of the Lord Advocate and of subordinate public prosecutors acting under his control. The Lord Advocate is the principal public prosecutor in Scotland, and can prosecute in any Court.¹ He is the only competent public prosecutor in the High Court, the Solicitor-General and the Advocates-Depute being his deputies.² In Solemn procedure in the Sheriff Court the public prosecutor is the Procurator-Fiscal who takes his instructions from the Lord Advocate. The Indictment is signed by the Procurator-Fiscal upon the authority of the Lord Advocate.³ In important cases the prosecution in the Sheriff Court is taken by one of the Advocates-Depute.

Change of Lord Advocate.—The Lord Advocate and his deputes do not demit office on the resignation of the Lord Advocate, but continue in office until their successors receive their appointments.⁴ The Lord Advocate enters upon the duties of his office immediately on receiving his appointment, and takes the oaths of office before any Secretary of State, or any Lord Commissioner of Justiciary.⁵ All Indictments which have been raised by a Lord Advocate continue in force and effect notwithstanding his resignation, and may be taken up and proceeded with by his successor.⁶

When the Lord Advocate dies during his tenure of office, or is otherwise removed from office, it is lawful to indict persons accused in name of the Solicitor-General then in office, until another Lord Advocate is appointed. The Advocates-Depute and the Procurators-Fiscal have power, notwithstanding the death or removal from office of the Lord Advocate, to take up and proceed with any Indictments already raised in name of such Lord Advocate, and any Indictments that may be raised in name of the Solicitor-General.⁷

Illustration.—An Indictment was dated 3rd October 1891, in

¹ Macdonald 284 ; Alison ii. 86.

⁴ *Ibid.*, § 3.

² Hume ii. 130.

⁵ *Ibid.*

³ 1887 Act, § 2.

⁶ *Ibid.*

⁷ *Ibid.*

the name of a Lord Advocate who had previously become Lord Justice-General. His successor did not receive his appointment till 6th October 1891. The Court held that the instance was good.¹

The Lord Advocate was appointed Lord Justice-General on 15th October 1913, and his successor was not appointed till 31st October. On 22nd October the accused was served with an Indictment at the instance of the Solicitor-General, and signed by the Procurator-Fiscal "by authority of the Solicitor-General." It was held that the course followed was the proper one, and the preceding case of *Halliday* was discussed. It was also held that the fact that the Solicitor-General had been raised to the bench prior to the conclusion of the case, did not cause the Indictment to lapse.²

Private Prosecution.—The system of public prosecution so long in vogue in Scotland has been attended with such satisfactory results that private prosecution is practically unknown.³ Hume mentions two cases,⁴ one in 1633 and the other in 1823. The question arose, however, in 1909, when the right of private prosecution was affirmed.⁵ A citizen desiring to institute a prosecution at common law must be in the position that he has applied to the Lord Advocate to obtain his concurrence to the prosecution, and that the crime alleged is a wrong towards himself. But the Lord Advocate does not have an absolute right of veto, and where he refuses his concurrence the citizen may complain to the High Court of Justiciary.⁶ The Court, if it takes a different view from the Lord Advocate, may either direct him to give his concurrence or authorise the private party to proceed without his concurrence. The latter is the more practical and less embarrassing course.⁷ It is essential that the concurrence of the Lord Advocate be asked; and where a Bill for Criminal Letters to authorise a private prosecution was presented without the concurrence of the Lord Advocate having been asked, it was refused as premature and incompetent.⁸

Illustration.—A company accused a person of the crime of falsehood, fraud, and wilful imposition. The Lord Advocate refused to prosecute or grant his concurrence. The company presented a Bill praying for Criminal Letters to institute a prosecution. The Bill was heard before a full bench. The Lord Advocate appeared and maintained his refusal. He stated that in his opinion the Bill was relevant,

¹ *Halliday v. Wilson*, 1891, 19 R. (J.) 3; 3 White 38.

² *Solicitor-General v. Lavelle*, 1914, S.C. (J.) 15; 7 Adam 255.

³ *J. & P. Coats v. Brown*, 1909, S.C. (J.) 29; 6 Adam 19.

⁴ ii. 126.

⁵ *J. & P. Coats v. Brown*, *supra*.

⁶ *Mackintosh v. H.M. Adv.*, 1872, 2 Coup. 236; *Robertson v. H.M. Adv.*, 1887, 15 R. (J.) 1; 1 White 468.

⁷ *J. & P. Coats v. Brown*, *supra*, per L.J.C. Macdonald, at p. 34.

⁸ *Robertson v. H.M. Adv.*, 1892, 3 White 230.

but that he based his decision upon the improbability of a conviction being secured. The Court, holding that the private prosecutor had shown grounds why he should not be shut out from his rights as a citizen to have an alleged crime investigated, authorised the company to institute a prosecution by way of Criminal Letters in the High Court, without the concurrence of the Lord Advocate.¹

While private prosecution is competent in the High Court, it is incompetent for a private person to prosecute on Indictment in the Sheriff Court, whether with the concurrence of the Lord Advocate or not.² There is no recorded example of private prosecution on Indictment in the Sheriff Courts, and the older text-writers regard it as incompetent.³

Illustration.—Dunbar, an aerated water manufacturer, instituted a Summary prosecution against Johnston, another aerated water manufacturer, for contravention of the Merchandise Marks Act, 1887, § 2. Under sub-sec. 6 of that section provision is made for the accused being informed of his right to be tried on Indictment, and if he requires it, to be so tried. On the calling of the case the accused elected to be tried on Indictment, and the Summary complaint was withdrawn. Thereafter, an Indictment at the instance of Dunbar, with the concurrence of the Lord Advocate, was served upon the accused. At the first diet the Sheriff dismissed the case in respect that the procedure was incompetent. Dunbar advocated. The Court, without deciding the competency of an Indictment in the High Court at the instance of a private prosecutor with consent of the Lord Advocate, held that such procedure was incompetent in the Sheriff Court. Opinions were also expressed that the provision in sub-sec. 6 as to an accused person having a right to be tried on Indictment did not apply to Scotland.

¹ *J. & P. Coats Ltd. v. Brown, supra.*

³ Mackenzie, Criminal Law, Part ii.,

² *Dunbar v. Johnston*, 1904, 7 F. 40; Tit. 19, § 1.

4 Adam 505.

CHAPTER II

INITIAL STEPS

Regulating Statutes.—It has already been explained that in Scotland the only Courts which exercise Solemn Criminal Jurisdiction are the High Court of Justiciary and the Sheriff Court. In both these Courts procedure is regulated for the most part by the 1887 Act, the Criminal Procedure (Scotland) Act, 1921, the Bail Act, 1888, and certain sections of the 1908 Act. Procedure in appeals by persons tried on Indictment is regulated by the Criminal Appeal Act of 1926. From the provisions of the 1887 Act the crimes of treason and rebellion against the Sovereign are specially excepted. The procedure in the prosecution and trial of such crimes is regulated by ancient law and practice.¹

The present chapter sets out the various steps to be taken by the Procurator-Fiscal in procuring the arrest and commitment of an accused person.

1. Petition.—The initial writ in Solemn Criminal Jurisdiction, whether in the High Court of Justiciary or the Sheriff Court, is a Petition for warrant to arrest the accused person and commit him to prison. This petition sets forth, where the particulars are known, the name, designation, and address of the accused person; states the criminal charge against him; and craves the necessary warrants. It is illegal to apply for a general warrant to arrest all persons suspected of a certain crime, or to search at large for stolen goods or other productions, without making a specific charge against a particular individual.² If the name of the accused person is unknown, the Petition may set forth "that a man to the petitioner unknown," giving such a description as will suffice to distinguish him, has committed a certain offence.³

In stating the charge, the same general principles apply which regulate the statement of the charge in an Indictment.⁴ Those principles will have to be discussed in treating of the preparation of the latter document, and it will be more convenient to reserve until then what has to be said on the subject.⁵ It must be observed, however, that the facts of a case have seldom been fully investigated at this early stage of the proceedings, and consequently

¹ 1887 Act, § 75.

⁴ 1887 Act, § 16.

² Hume ii. 78; *Bell*, 1865, 5 *Irv.* 57.

⁵ P. 46, *infra*.

³ *Alison* ii. 123.

the time, place, and mode of committing the crime have usually to be described in a tentative manner. The charge set forth in the petition may, and often does, differ materially from the charge ultimately set forth in the Indictment. This cannot be avoided. All that is necessary is to indicate, as clearly as circumstances permit, the person accused and the nature of the charge against him.

It is proper that the petition should be dated; but if the date is inadvertently omitted, the omission can be supplied otherwise.¹

Where a Petition in ordinary form had been presented and the proceedings against the accused thereafter abandoned, Crown Counsel later ordered his apprehension. The new proceedings were initiated by a minute written on the original Petition. This practice was held not to be objectionable, but it would appear the better course in such circumstances to present a fresh Petition.²

2. Warrant to Arrest.—Upon presentation of a duly signed Petition, the magistrate usually grants warrant to arrest as a matter of course. Such Petitions, being presented by responsible officials, are assumed to be well founded. In an emergency, warrant to arrest may be granted without a written petition;³ but this course ought not to be adopted where it is possible to follow the regular practice. Any magistrate may grant warrant to arrest a person charged with a crime committed within his jurisdiction, although the charge is of too serious a character for him to try.⁴ In modern practice, however, the initial warrant in Solemn Criminal Jurisdiction is signed by a Sheriff-Substitute of the sheriffdom to which the accused person is amenable.

3. Arrest.—An accused person may be arrested with or without a warrant. If he has been arrested without a warrant, a Petition is presented and a regular warrant obtained as soon as possible, and thereafter the procedure is the same as if a warrant had been granted before apprehension.

Arrest without a Warrant⁵ is always regarded as a step which calls for an explanation.⁶ It may be laid down as a general rule that an officer of the law, within his own jurisdiction,⁷ is entitled to arrest without a warrant in the following circumstances, if there is a probability that unless he does so justice will be defeated:—

- (1) If he finds any person in the act of committing, or attempting to commit, a serious crime;

¹ *M'Leod v. Buchanan*, 1835, 13 Shaw 1153; *Crawford v. Wilson*, 1838, 2 Swin. 200.

² *M'Vey v. H.M. Adv.*, 1911, S.C. (J.) 94.

³ Hume ii. 77; Alison ii. 121; Macdonald 260.

⁴ *Ibid.*

⁵ Macdonald 259; Hume ii. 75; Alison ii. 116 *passim*, and see *Beaton v. Ivory*, 1887, 14 R. 1057.

⁶ *Shields v. Shearer*, 1914, S.C. (H.L.) 33.

⁷ *Leask v. Burt*, 1893, 21 R. 32.

- (2) If he finds any person under suspicious circumstances with goods in his possession which the officer knows or believes to have been stolen, and for the possession of which the person cannot account in any way consistent with innocence; or
- (3) If he is informed by the injured person, or by a credible eye-witness, that any person has just committed, or attempted to commit, a serious crime.

With regard to minor offences, it is not desirable to arrest without warrant unless there is danger of the offence being repeated, or of the accused person absconding or doing injury to himself or others. In addition to these general powers, many Acts of Parliament, especially Police Acts, authorise arrest without warrant in special circumstances.

In more serious cases, if an officer, in virtue of his power to arrest without warrant, is in pursuit of an alleged criminal who takes refuge in a house, the officer informs the inmates of the house as to his official authority, states the charge against the fugitive, and demands admittance. If he is refused, he may force open the door. He may demand the assistance of bystanders.¹

Arrest on Warrant.—An officer of law must not attempt to arrest outside the bounds for which he acts, or, if he has a warrant, outside the bounds within which the warrant runs.² It may be noted that apprehension on a criminal charge may take place on Sunday.³

The officer first informs his prisoner of the charge against him. If asked, he shows his warrant (if any), but retains possession of it.⁴ He warns the prisoner that he need not say anything with reference to the charge, but that, if he does so, what he says will be written down and may be used as evidence against him. He ought not to put questions to the prisoner, but any voluntary statement with reference to the charge should be noted in writing at the time.⁵ The officer then brings his prisoner as speedily as possible before a magistrate. He may detain him in a police station house, or other suitable place, if necessary on account of the lateness of the hour, the distance to travel, or other sufficient cause.⁶ This is the rule where the arrest is on warrant, and it applies with greater force in the case of arrest without warrant.⁷

There sometimes arise cases where an accused person is brought

¹ Hume ii. 76; Alison ii. 117, 118.

² Macdonald 261; Hume ii. 78.

³ *Maitland v. Douglas*, 1861, 24 D. 193.

⁴ Macdonald 263; Hume ii. 79;
M'Leod v. Buchanan, *supra*.

⁵ *H.M. Adv. v. Laing*, 1871, 2 Coup.
23; *Gracie v. Stuart*, 1884, 11 R. (J.C.)

22; *Smith v. Lamb*, 1888, 15 R. (J.) 54;

1 White 600; *H.M. Adv. v. Simpson*,

1889, 2 White 298; *Waddell v. Kinnaird*,

1922, J.C. 40. See p. 271, *infra*.

⁶ *Crawford v. Blair*, 1856, 2 Irv. 511.

⁷ Macdonald 263; *Macdonald v. Lyon*, 1851; J. Shaw 516.

before the Sheriff without actual apprehension. It is competent to warn him that there is a warrant against him and that he has to attend at a certain time and place. This course may be adopted where there is no reason to fear that its adoption will defeat justice.¹

An arrested person is entitled to have intimation sent at once to a law agent informing him that his assistance is required, and where the judicial examination is to take place.²

The case of persons under sixteen years of age is treated later.³

4. Arrest beyond Jurisdiction.—It is sometimes necessary to arrest an accused person outside the territory of the magistrate who has granted the warrant. As a general rule, a warrant has no legal effect beyond the bounds for which it is issued, unless it is backed by a competent magistrate of the jurisdiction in which it is to be enforced.⁴

Within Scotland, a warrant of the High Court of Justiciary runs throughout the country without backing.⁵ A warrant granted by a Sheriff against a person charged with having committed a crime within his sheriffdom, may be executed by the arrest of that person at any place within Scotland without backing or indorsation, if executed by a messenger-at-arms, or an officer of the Court where it was issued.⁶ If not so executed, a warrant to arrest, in Solemn Jurisdiction, has to be indorsed by the Sheriff of the sheriffdom in which it is to be executed. As we shall see, an officer has more extensive powers in Summary procedure. In practice, the existence of a warrant is held sufficient to permit of any police officer taking the accused person into custody and detaining him pending the arrival of the officer who is in possession of the warrant.

An officer of one jurisdiction, while conveying his prisoner through the jurisdiction of another Court, has all the powers of an officer of the latter Court without indorsation.⁷

In a Border county—namely, Northumberland, Cumberland, Berwick, Roxburgh, or Dumfries—an officer of law can execute without indorsation a warrant for the apprehension of a criminal accused or convicted of a crime committed in the county for which he is appointed a constable.⁸

If the accused person is in England, Wales, Ireland, or the Channel Islands, the provisions of the Indictable Offences Act, 1848, regulate the procedure. A warrant issued in Scotland by a judge of the High Court of Justiciary, a Sheriff, a Justice of Peace, or a Burgh Magistrate, or a warrant issued under the 1908 Act, may be indorsed by a Justice

¹ *Spewart v. Burr*, 1895, 22 R. (J.)

25; 1 Adam 539.

² 1887 Act, § 17.

³ P. 252, *infra*.

⁴ Macdonald 261; Hume ii. 79;

Alison ii. 124.

⁵ Hume ii. 78.

⁶ 1 & 2 Vict. c. 119, § 25.

⁷ 11 Geo. IV. and 1 Will. IV. c.

37, § 6.

⁸ 20 & 21 Vict. c. 72, § 11.

of the Peace who has jurisdiction at the place where it is to be executed. When it has been backed, the warrant may be executed either by the person who brings it, or by any person to whom it was originally addressed, or by a constable or other officer of the law for the place where it is indorsed.¹ It is now the practice to convey the prisoner into the jurisdiction from which the warrant was issued, and take him before a magistrate there, without previous examination at the place of his arrest.²

If a warrant is to be executed under the Indictable Offences Act, 1848, by an officer of the Court from which it was issued, the officer should see it signed and be prepared to depone to the signature. He then proceeds to the jurisdiction where it is to be executed, attends before a Justice of Peace, and after being put on oath deposes that the signature to the warrant is the signature of the magistrate. It is then backed by the Justice of the Peace.

If, on the other hand, it is to be executed by an officer of the foreign jurisdiction, a declaration as to the signature must be written upon it before it is despatched. By means of this declaration the foreign officer gets his warrant backed. Forms are given in the Appendix. While this is the general practice, the procedure varies somewhat in different Courts in England and Ireland.

5. Fugitive Offenders.—When a person accused of crime has fled beyond the British Isles (including the Isle of Man and the Channel Islands), into another part of the British Empire, he is recovered in pursuance of the Fugitive Offenders Acts, 1881 and 1915.³

The fugitive must be charged with having committed an offence to which the Act applies.⁴ A person convicted of such an offence, who is unlawfully at large before the expiration of his sentence, is also dealt with under the same statute.

The crimes specified in the Act are :—

- (1) Treason ; (2) Piracy ; (3) Any offence punishable by imprisonment with hard labour, rigorous imprisonment, or confinement in prison combined with labour, for a term of twelve months or more, or by any greater punishment.⁵

For the purposes of the Act the following countries are each deemed to form one part of the British Empire :—

- (a) The British Isles—that is, Great Britain and Ireland,⁶ the Isle of Man, and the Channel Islands.

¹ 11 & 12 Vict. c. 42, §§ 14 and 15 ; and 12 & 13 Vict. c. 69, § 15.

² *Sinclair v. H.M. Adv.*, 1890, 17 R. (J.) 38 ; 2 White 481.

³ 44 & 45 Vict. c. 69 ; 5 & 6 Geo. V. c. 39.

⁴ § 2.

⁵ § 9.

⁶ The 1881 Act is not one of those acts adapted to the Irish Free State by § 2 and the schedule of the Irish Free State (Consequential Adaptation of Enactments) Order, 1923.

- (b) Any other British possession, consisting of a territory or group of territories under one legislature.
- (c) Any place out of His Majesty's dominions in which His Majesty has jurisdiction, and to which the Act has been extended by Order in Council.¹

The first step is to locate the fugitive, by finding the place he is in, or to which he is proceeding. This being ascertained, the Procurator-Fiscal reports to the Crown Agent, who communicates with the Lord Advocate and Home Secretary.

A statutory preliminary is to procure an indemnity for all expenses, signed by the injured party or informer. This requirement is not, however, insisted on in Scots procedure.

The Petition for warrant to arrest must be prepared with special care, and may contain greater detail of statement than would be necessary if the proceedings were to be confined to Scotland. In particular, it must contain a distinct allegation that the offence charged is punishable in Scotland by at least twelve months' imprisonment with hard labour.

The Procurator-Fiscal must procure depositions :—

- (1) Showing that there is a strong or probable presumption that the fugitive committed each of the offences mentioned in the warrant ;
- (2) Stating that these offences are punishable in Scotland on Indictment or Complaint, by punishment of the degree above mentioned ; and
- (3) Containing a description of the fugitive sufficient for his identification, with a photograph if one can be procured.

The depositions should be sworn before the magistrate who grants warrant to arrest. A certified copy is prepared, and authenticated by the same magistrate. The officer who is to go out for the fugitive should be present and see the warrant and depositions signed and certified, in order that he may be in a position to prove the signatures.²

The following documents are transmitted by the Procurator-Fiscal through the Crown Agent to the Home Office :—

- (1) A letter containing a brief statement of the facts, the supposed location of the accused, the means of tracing and identifying him, and whether it is desired that his provisional arrest should be asked by telegram ;
- (2) The Petition and Warrant to apprehend *in duplicate* ;
- (3) The depositions of witnesses ; and
- (4) The certified copy of the depositions.

¹ §§ 36, 37, and 39.

² § 29.

The seal of the Secretary of State is affixed to the warrant, duplicate warrant, depositions, and certified copy depositions. One set, including the original depositions, is returned to be taken out by the officer; the other set, including the warrant in original and the certified copies of the depositions, is sent through the Colonial Office to the Governor of the colony.

The officer is furnished with proper credentials from the Colonial Office, on application made by his Chief Constable through the Procurator-Fiscal and Crown Agent. His name and the date of his intended departure are intimated to the Home Secretary through the same channel. He may go out at once with the warrant, or he may wait until the arrest of the fugitive is notified by telegram. In either case he must not interfere in any way beyond giving information or evidence when requested. The accused is dealt with exclusively by the colonial authorities. The procedure in the colony is prescribed by the statute, and need not be discussed here.

The Act also makes provision for dealing with fugitives from another part of the British Empire to Scotland. This will be found on reference to the statute. It does not form part of Scottish criminal procedure, being an exceptional process.

Illustration.—James Carlin, residing in Edinburgh, was apprehended on a charge of murder under a warrant granted by a Justice of the Peace of the Colony of the Cape of Good Hope and indorsed by a Secretary of State. The warrant did not state the name of the person murdered, the *locus* of the murder, nor did it contain any statement that the *locus* was within Her Majesty's Dominions. It was held that the warrant, being endorsed by a Secretary of State, must be accepted by the Sheriff as a valid warrant, but that in considering the depositions in support of the warrant the Sheriff must be satisfied that these bear that the offence was committed within the Queen's dominions, and that they raise a "strong or probable presumption" that the fugitive had committed the offence charged against him.¹

6. Extradition.—When a person accused of crime has fled from Scotland to a foreign country, he may be recovered by virtue of special treaties between the British Government and that country. The general procedure is regulated by the Extradition Acts, 1870 to 1906.² The particular details are prescribed by the several treaties and the Orders in Council applying these. The latter are published in the *London Gazette*.

There is no extradition for political offences, and in some cases the foreign country is not bound to surrender one of its own subjects

¹ *Carlin v. Government of Cape Colony*, 1885, 12 R. (J.) 50; 5 Coup. 649,

² 33 & 34 Vict. c. 52; 36 & 37 Vict. c. 60; 58 & 59 Vict. c. 33; 6 Edw. VII. c. 15.

or citizens. A long list of extradition crimes is given in the statute of 1870 and the treaties.

A fugitive criminal is a person accused or convicted of a crime falling within the Extradition Acts and treaties. The procedure for extradition is practically the same as that already described with reference to the recovery of an offender who has fled to a British possession ; but it is necessary to keep in view the special conditions of each treaty, and the requirements of the Courts in each foreign country. These points are so various that an attempt to summarise them here would only lead to mistakes. When it is intended to apply for extradition, the conditions applicable to the particular country, where the accused person is located, must be ascertained and complied with carefully.

7. Judicial Examination.—The person accused having been taken into custody in one or other of the modes which have been described, the next step is to bring him with the least possible delay before a magistrate—almost invariably the Sheriff-Substitute—in order that he may have an opportunity of making any explanation which he thinks fit. The judicial examination was formerly of considerable importance, but it has ceased to be so since the passing of the 1908 Act, which entitles the accused to refuse to emit a declaration.¹ It is now the exception rather than the rule for a declaration to be made. It appears that omission of the examination does not necessarily vitiate the subsequent commitment,² but even where an accused person has been previously apprehended on the same charge and brought before a magistrate, he ought, when apprehended a second time, again to be given an opportunity to emit a declaration.³

No fixed interval has been defined, but examination should, if possible, take place not later than the morning of the day after arrest. It was once the practice to conduct the examination, if necessary, on Sunday, but this is not done now. The necessity for avoiding delay arises from the circumstance that the accused person cannot apply for liberation on bail until after he has been brought before a magistrate. It is also possible that he may be able to make such a statement on examination as will warrant his immediate liberation.

Immediately upon arrest, the accused is entitled to have intimation sent to any properly qualified law agent, that his professional assistance is required by such person, and informing him of the place to which such person is to be taken for examination. In order to allow time for the attendance of such law agent, the Sheriff or magistrate may delay the examination for a period not exceeding forty-eight hours from the time of arrest.⁴

¹ § 77 (1).

² *M' Vey v. H.M. Adv.*, 1911, S.C. (J.) 94 ; 6 Adam 503.

³ Hume ii. 80.

⁴ 1887 Act, § 17.

The examination may be conducted before any magistrate, even before one who has not power to try the offence.¹ In practice, a Sheriff-Substitute invariably presides. An Honorary Sheriff-Substitute may preside, but the Sheriff Clerk, although holding a commission to act as Sheriff-Substitute, may not do so.²

The prisoner is entitled to have a private interview with his law agent before his examination.³ The agent is present at the examination, but does not interfere. It is the duty of the magistrate, where the prisoner is not attended by a law agent, to inform him of his right.⁴

The agent has first to consider whether his client should emit any declaration at all. If he decides against emitting a declaration, the accused or the agent, when the former is brought before the Sheriff for examination, intimates that he does not desire to emit a declaration in regard to the charge. It is then unnecessary to take a declaration, and the accused may be committed for further examination, or until liberated in due course of law, without a declaration being taken. The accused can subsequently emit a declaration on intimating to the prosecutor his desire to do so. An accused may be indicted in the name under which he is committed until liberated in due course of law.⁵

The proceedings are private. All persons ought to be excluded except the Magistrate, the Sheriff Clerk or his depute, the Procurator-Fiscal or his depute, the prisoner and his agent, and the necessary police officers. The magistrate must be present and attentive during the whole proceedings. The magistrate should interrogate the prisoner,⁶ though in practice the Procurator-Fiscal generally does so.⁷

Care must be taken to see that the prisoner is in his sound mind and sober senses. If he is intoxicated, the examination will be deferred until he is sober. If there is reason to suspect that he is of unsound mind, he should be examined by a medical man, and the result entered in the record of proceedings. If he is certified to be insane, the examination is stopped, and he is committed to prison to await further procedure.

The prisoner's statement must be free and voluntary. No inducement of any kind can be offered to him to make him speak.⁸ In fact, the less that is said to him by anyone except his own agent, the better.

The charge in the Petition is read over to the prisoner. The

¹ Hume ii. 77; Alison ii. 566; *Hay*, 1824, Shaw (Just.) 113.

² *Mabon and Shillinglaw*, 1842, 1 Broun 201; *Stewart*, 1857, 2 Irv. 614.

³ 1887 Act, § 17.

⁴ *H.M. Adv. v. Goodall*, 1888, 15 R. (J.) 82; 2 White 1.

⁵ 1908 Act, § 77 (1).

⁶ *H.M. Adv. v. Brims*, 1887, 1 White 462.

⁷ Macdonald 265.

⁸ Hume ii. 324; Macdonald 267.

magistrate then addresses him in some such formula as this:—
 “ You have heard the charge which has been read over to you. You have been brought here for the purpose of being judicially examined in regard to that charge. You are not bound to answer any questions which may be put to you ; but if you do answer, what you say will be written down and may be used in evidence against you at your trial.”

If the prisoner intimates that he does not desire to emit a declaration, the fact is recorded in the warrant of commitment.¹ If he refuses to give any answer, the fact is noted. If he makes a statement, the material substance of it is written down, but it is not necessary to note every word.² The declaration is written by the Sheriff Clerk or his depute. No one connected with the prosecution may do so.³

At the close the whole is read over to the prisoner, and he is asked if he adheres to it. If so, he signs the declaration, or if he declares he cannot write, the fact is noted. The declaration is then signed by the magistrate, and two or three of those present as witnesses.

If the prisoner is a foreigner, an interpreter is employed, who first takes the oath *de fidei*. He interprets the charge to the accused, and the questions and answers, and reads the declaration to the prisoner.

The prisoner may if necessary be re-examined at any time prior to service of the Indictment.⁴ Where fresh charges emerge, it is always proper that he should be examined anew upon these, although this is not essential.⁵

When there are charges against an accused person in several counties, he may be brought before the Sheriff of any one of them for examination on all or any of the charges.⁶

8. Committal.—At the close of the judicial examination, or without any examination, if the prisoner so desires, the Procurator-Fiscal moves the presiding magistrate to commit the prisoner to prison, either for further examination or until liberated in due course of law. The latter form is often called “ committal for trial.” If the first committal is only for examination, the prosecutor must see that the accused is in due course committed for trial.

The length of time which may intervene between committal for further examination and committal for trial is not absolutely fixed, but ought as a general rule not to exceed eight days. This must be particularly observed in those cases where bail cannot be insisted

¹ 1908 Act, § 77 (1).

² *H.M. Adv. v. Brown*, 1866, 5 Irv.
 215.

³ *Galbraith v. Sawers*, 1840, 3 D. 52.

⁴ Macdonald 269 ; Hume ii. 331.

⁵ *H.M. Adv. v. Keith*, 1875, 2 R. (J.)
 27 ; 3 Coup. 125.

⁶ 1908 Act, § 77 (2).

upon till *after* committal until liberation in due course of law. If the prisoner has been committed for further examination and liberated on bail, it is not necessary to commit him until liberated in due course of law.¹

Before the magistrate can commit an accused person to prison, until liberated in due course of law, he ought to be shown enough evidence to establish a *prima facie* case against the accused. Three things are necessary to a valid committal² :—

- (1) A written and signed warrant which clearly specifies the person to be committed ;
- (2) A specific statement of the crime in respect of which he is committed ; and
- (3) An information signed by the person who craves committal.

These matters are in practice attained by presenting to the magistrate the original Petition for warrant to arrest, with the other warrants annexed to it.

On the same day that the accused person is committed to prison until liberated in due course of law, he is served with a full copy of the Petition and warrants signed by the officer or warder who serves it.³ This service is not required when the committal is merely for further examination. No form of execution of service is provided. Where necessary, it is proved by the oath of the officer ; but, in order to prevent errors, it is desirable to preserve a memorandum of the time and place of service, signed by the officer or warder who serves.

It may be observed that the original warrant of committal to prison until liberated in due course of law remains in force until the accused person is acquitted, or sentenced or liberated in legal form.⁴

Where there are charges against an accused person in *different counties*, he may be committed on all or any of the charges by the Sheriff of any one of such counties before whom he is brought.⁵

An invalidity in the warrant of commitment of an accused person does not vitiate a conviction proceeding on an Indictment regularly served and a trial regularly conducted.⁶ A bad commitment is no more in law than a non-commitment.

Illustration.—An accused person was apprehended and a Petition in ordinary form was presented. Thereafter an Indictment was served on him, but was not proceeded with. Subsequently Crown Counsel ordered his reapprehension in order that a new Indictment might be served. Instead of a new Petition being presented, a

¹ 1887 Act, § 18.

² Macdonald 272 ; Hume ii. 84 ; Alison ii. 151 ; Act, 1701, c. 6.

³ Macdonald 274 ; Hume ii. 85 ; Alison ii. 154 ; Act, 1701, c. 6.

⁴ 1887 Act, §§ 31, 34, and 52.

⁵ 1908 Act, § 77 (2).

⁶ *M'Vey v. H.M. Adv.*, 1911, S.C. (J.) 94 ; 6 Adam 503 ; *H.M. Adv. v. Keith*, 1875, 3 Coup. 125, at 130.

minute was written on the original Petition and the crave for examination was omitted. The Court held that it was not objectionable to proceed by way of minute, that the omission of the crave for examination was bad and faulty practice, but that even on the assumption that the commitment was bad, the subsequent proceedings were not vitiated.¹

9. Bail.—All crimes and offences, whether at common law or by Act of Parliament, are bailable except murder and treason.² Even in regard to these excepted crimes, bail may be accepted at the discretion of the Lord Advocate, or the High Court of Justiciary.³ An application for liberation on bail may be made either before or after final commitment.

Before final Commitment.—Any person accused of a crime, which is by law bailable, is entitled, immediately after he has been brought before a magistrate for examination on declaration, to apply to such magistrate or to the Sheriff for liberation on his finding caution in common form to appear at any diet to which he may be cited for further examination, or in order to answer any Indictment or Complaint which may be served upon him.⁴ The prosecutor is entitled to be heard against such application, and the Sheriff or other magistrate is entitled in his discretion to refuse such application before the accused is committed until liberated in due course of law.⁵ In a serious case liberation on bail will be granted before final committal only in very special circumstances. When an application for bail is made before commitment and refused, it is incompetent for the accused to appeal to the High Court. The statute gives a right of appeal only in cases of refusal of bail after commitment.⁶

Admission to Bail after Commitment.—In the event of bail being refused prior to committal till liberation in due course of law, the application may be renewed after such commitment.⁷

Any Sheriff or Sheriff-Substitute having jurisdiction to try the offence charged, or to commit the accused until liberated in due course of law, may at his discretion admit or refuse to admit the accused to bail.⁸

Procedure.—Application for liberation is usually made by Petition, and ought invariably to be so if there is any prospect of a dispute as to the amount of bail, and of a subsequent appeal.⁹ In the ordinary

¹ *M' Vey v. H.M. Adv., supra.*

² Bail Act, §§ 2 and 9.

³ *Ibid.* § 8; Macdonald 275; Humeii. 89.
H.M. Adv. v. Thomson, 1871, 2 Coup. 103.

⁴ 1887 Act, § 18.

⁵ *Ibid.*

⁶ *Lowson v. H.M. Adv.*, 1909, 2 S.L.T. 329; 6 Adam 118.

⁷ Bail Act, § 3.

⁸ *Ibid.* §§ 2 and 9.

⁹ *Arbuckle v. Taylor*, 1815, 3 Dow's App. 160.

case it may be applied for verbally, and fixed by the Sheriff in the warrant of committal. When this is done, a clause is added to the warrant in these terms: "and admits the said A. B. to bail on his finding caution to the extent of pounds sterling."

An application for bail must be disposed of within twenty-four hours after its presentation to the magistrate, failing which the accused is forthwith liberated.¹ An opportunity must be given to the prosecutor to be heard upon such application.

The Court's discretion to allow or to refuse Bail.—When an accused person asks for bail, bail he must get unless a sufficient ground is brought forward requiring the Court to exercise its discretion in refusing it.²

Whether bail should or should not be granted lies in the discretion of the Court before which the accused person is brought.³ This discretion is quite general. "The broad consideration which rules its exercise is a single regard to the public interest and the ends of justice."⁴ There may be many cases in which this discretion is appropriately exercised by refusing bail. Each case must be judged on its merits.

Illustrations.—Certain persons were charged with having firearms in their possession contrary to the Explosives Substances Act, 1883, § 3, as extended by the Firearms Act, 1920, § 7. The Lord Advocate stated to the Court that the liberation of the accused would constitute a serious risk to the public safety. For the accused it was argued that the test of the Court's discretion was the probability of the prisoner appearing to take his trial. Reliance was laid on an English case, *In re Robinson*,⁵ and on certain dicta of Lord Justice-General Dunedin in *A. B. v. Dickson*.⁶ Bail was refused. It was pointed out that the right of refusal was not limited to cases where the Court thinks that there is danger of the accused absconding, but applies to all cases where the public interest demands it.⁷

A person was charged with housebreaking. Previous convictions were libelled against him. He was released on bail but did not appear at the second diet. Lord Salvesen, the presiding judge, observed: "It is obvious that it would be exceedingly detrimental to the public interest if it was supposed that every person who was accused of any crime short of murder or treason was entitled to be set at liberty until the day of his trial upon finding a certain amount of bail. I think that is not the law. In the ordinary case bail ought to be allowed only where the person accused has previously been a law-

¹ Bail Act, § 2.

² *Mackintosh v. M'Glinchy*, 1921, J.C. 75, at 82.

³ Bail Act, § 2; 1887 Act, § 18.

⁴ *Mackintosh v. M'Glinchy*, 1921, J.C. 75 per L.J.G. Clyde, at p. 80.

⁵ (1854) 23 L.J., Q.B. 286.

⁶ 1907, S.C. (J.) 111; 5 Adam 372.

⁷ *Mackintosh v. M'Glinchy*, *supra*.

abiding citizen, with regard to whom there can be no reasonable doubt that, although he is released on bail, he will attend his trial when it comes on. It does not, in my opinion, apply to people who have been law-breakers in the past, and still less to persons who have a record of many previous convictions and have served sentences of penal servitude.”¹

A person charged with administering poison with intent to murder was refused bail, the prosecutor having opposed the application on the ground that the precognitions disclosed an aggravated case. The High Court, on appeal, held that bail was rightly refused.²

The question of the discretion of the Court in granting or refusing bail has also arisen in cases of rape. In 1889, shortly after the change in the law as to bail, Lord Justice-Clerk Macdonald expressed the view that in cases of rape bail should be granted only in exceptional cases.³ Subsequently Lord Justice-General Dunedin expressed a more qualified opinion on the subject.⁴ In view, however, of the case already referred to, *Mackintosh v. M'Glinchy*,⁵ it would appear that each case of rape must turn on its particular circumstances.

Bail of £50 was fixed in a case of rape. On appeal, the High Court reversed the decision of the Sheriff and refused bail. The Lord Justice-Clerk Macdonald said: “I am of opinion that bail should not be allowed in any case where the public prosecutor charges the prisoner with the crime of rape—unless the circumstances be very exceptional—and certainly not where the Lord Advocate objects to its being granted, and states on his responsibility that his investigation of the case does not disclose any facts tending to show that it should be dealt with as exceptional. If in any such case there were exceptional circumstances, the Lord Advocate could himself take these into consideration and consent to bail; but I should regret its being established as a precedent in principle that bail is to be allowed in ordinary cases of rape.”⁶

The accused was charged with rape and applied for bail. The Procurator-Fiscal opposed the application, and the Sheriff refused it, stating that on the authority of *Wilson v. M'Guire*,⁶ he considered he was bound to do so. On appeal, held that the crime was bailable under the Act of 1888, and that the question was one for the discretion of the judge. Lord Justice-General Dunedin observed: “The Solicitor-General has consented to liberation being granted on bail, and there is therefore no further question in this case. But as the

¹ *H.M. Adv. v. Quinn and Macdonald*, 1921, J.C. 61.

² *H.M. Adv. v. Saunders*, 1913, S.C. (J.) 44; 7 Adam 76.

³ *Wilson v. M'Guire*, 1889, 16 R. (J.) 89; 2 White 267.

⁴ *A. B. v. Dickson*, *supra*.

⁵ *Supra*.

⁶ *Wilson v. Maguire*, 1889, 16 R. (J.) 89; 2 White 267.

matter of the discretion of the Court in granting liberation on bail in such cases has been mooted, it is right that I should deal with it. I cannot help thinking that a misunderstanding has arisen from the fact of the rubric in *Wilson v. M'Guire* going further than the Lord Justice-Clerk's judgment warrants. I do not think that his Lordship meant to say more than that, in a case in which bail is asked, if the Lord Advocate objects to it being granted, the Court will be very slow indeed to do anything contrary to his judgment. He certainly did not mean to lay down a rule that in cases of rape the Crown ought not to grant consent. That the Court has the power to grant liberation on bail I do not think can be doubted."¹

Amount of Bail.—The magistrate who admits a person to bail fixes the bail at such an amount as he may consider sufficient to ensure the appearance of such person to answer at all diets to which he may be cited on the charge.² All Acts of Parliament which limit the amount of bail which may be fixed by a magistrate are repealed.³ There are few matters which require greater delicacy than fixing the amount of bail. A sum ought to be named which there is a reasonable probability that the prisoner can find, yet which will be sufficient to ensure that he will not abscond. It is not easy to combine these two essentials.

Illustrations.—The accused was charged with forging and uttering bills amounting to £498. In his declaration he admitted the charge under certain explanations. The Sheriff refused an application for bail, and on appeal to the High Court of Justiciary at Glasgow Circuit this refusal was confirmed. Lord Stormonth Darling said (p. 571): "I have consulted with my brother, Lord M'Laren, and we are of opinion that, looking to the serious character of the crime charged against the prisoner, we should not be justified in granting the application for bail. No doubt, in one view, it seems a little hard to use the confession of the prisoner against him, but at the same time his confession rather displaces the presumption of innocence on which such an application is largely founded."⁴

The accused was charged with scuttling three ships, the value of which, including cargoes, amounted in all to £3,800, and of uttering forged documents with a view to defraud the underwriters. The Sheriff fixed bail at £400, and on appeal by the accused the High Court declined to interfere, the Lord Justice-Clerk stating that he did not think the amount too high.⁵

The accused was first charged with having stolen eight sheep, and was liberated on £50 bail. Shortly afterwards he was rearrested

¹ *A. B. v. Dickson*, 1907, S.C. (J.) 111; 5 Adam 372.

² Bail Act, § 4.

³ *Ibid.*

⁴ *Scott v. H.M. Adv.*, 1890, 18 R. (J.) 15; 2 White 570.

⁵ *Hobbs v. H.M. Adv.*, 1893, 20 R. (J.) 62; 3 White 487.

on a charge of having stolen nine sheep prior to the theft already charged, and was liberated on £80 bail. He was a third time arrested and charged with stealing twelve sheep on a still earlier date, and the Sheriff fixed bail at £20, making £150 in all. When arrested on the third charge, letters were found in his possession pointing to an intention on his part to leave the country. On an appeal by the Procurator-Fiscal, the High Court fixed the bail on the third charge at £100, making it £230 in all. The Lord Justice-Clerk said : " If the question before us had been whether bail should be allowed at all, I should not have had much difficulty in holding that it should not, and that even on a first or a second charge of this nature, especially in a case where the accused on his arrest is found to have documents, partly in his own handwriting, and in his own possession, clearly pointing to an intention to escape and forfeit his bail bond." Lord M'Laren said : " The magistrate seems to have thought fit to fix the amount of bail for the successive charges on a descending scale. My own opinion is that it ought to be fixed on an ascending scale as new crimes are discovered, and the magnitude of the series of offences for which the accused is to be tried increases." ¹

A person charged with embezzling the sum of £400 applied for bail, which was refused. On appeal, the High Court, after hearing Counsel for the accused and for the Crown, admitted the accused to bail, and fixed the sum at £700.²

Appeal to the High Court.—Where an application for bail, made after committal until liberation in due course of the law, is refused, or where the applicant is dissatisfied with the amount of bail fixed, he may appeal to the High Court of Justiciary.³ The Court may in its discretion order intimation to the Lord Advocate. On the other hand, where an application for bail is granted at any stage, the public prosecutor, if dissatisfied with the decision allowing bail, or with the amount of bail fixed, may appeal in like manner. The applicant cannot be liberated, except as after-mentioned, until the appeal at the instance of the public prosecutor is disposed of.⁴

Written notice of appeal is immediately given to the opposite party by the party appealing. The appeal is disposed of in Court or in chambers, after such inquiry and hearing of parties as the Court deems just. In the event of the appeal of the public prosecutor being refused, the Court may award expenses against him.⁵ No clerk's fees, Court or other fees or expenses are exigible from, or can be awarded against, the accused person in respect of his application for bail, or of his appeal to the High Court.⁶

¹ *Peters v. M'Donald*, 1893, 20 R. (J.) 78 ; 1 Adam 72.

² *Sutherland v. Brims*, 1891, 2 White 576.

³ Bail Act, § 5.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.* § 6.

When an appeal is taken at the instance of the public prosecutor, the accused, if he has found bail, may be liberated after seventy-two hours, or where the place of application is in any island in the Outer Hebrides, or in the Orkney and Shetland Islands, ninety-six hours, from the time of his application being granted.¹ This liberation takes effect whether the appeal is disposed of or not, unless the High Court grants order for further detaining him in custody pending consideration of the appeal. Notice by telegraph to the gaoler, of the issue of such order within the appointed time, bearing to be sent by the Clerk of Court or by the Crown Agent, is sufficient to justify the applicant's detention until the arrival of the order in due course of post. In computing the period of hours, Sundays, public fasts, and public holidays, whether general or Court holidays, are not included.

In the case of a peer the procedure is special. He applies by Petition usually to the High Court or to the Sheriff, and in his bail bond binds himself to appear and answer to the charge within twelve months in Parliament or the Court of the Lord High Steward, or within six months before any Scottish Court.²

When bail is found, the accused person and his cautioner sign a bond which must specify a domicile of citation at which the Indictment or Complaint may be served.³ It must be kept in mind that this domicile determines the Sheriff Court in which the pleading diet is to be held.⁴

10. Precognitions.—The duty of obtaining precognitions of Crown witnesses rests on the Procurator-Fiscal. In the first instance these precognitions form the material on which a decision is reached as to whether proceedings are to be taken against a suspected person or not. Once a decision to prosecute has been reached, it remains true that in many cases the success of the prosecution depends on the care and thoroughness with which the precognosing is done.

The circumstances of each case differ so widely that it would serve no good purpose to enter into a statement of the methods of investigation which ought to be adopted. It is necessary, however, to say that all productions should be marked for identification at the trial. With this object, documentary productions are usually initialled by the witnesses who speak to them, and other productions, such as lethal weapons and stolen articles, have a label attached to them and sealed, which is signed by each witness to whom it is shown.

The precognition, having been completed, is reported in due course for consideration by Crown Counsel. If they are of opinion that there is no *prima facie* case against the accused person, an order will be made for his liberation (if in prison), which must be carried

¹ Bail Act, § 7.

² 6 Geo. IV. c. 66, § 8.

³ 31 & 32 Vict. c. 95, § 18.

⁴ 1887 Act, § 26.

out with the least possible delay. If the accused person has been liberated on bail, intimation is made to the Sheriff Clerk, in order that the bail bond may be discharged.

If Crown Counsel are of opinion that a *prima facie* case has been established, they will order the accused to be indicted for trial in the High Court of Justiciary, or remitted for trial by the Sheriff and a jury, or by the Sheriff summarily, according to the gravity of the charge. In either of the first two cases an Indictment has to be prepared.

It often happens that the Procurator-Fiscal has no difficulty in obtaining the information which he desires, but if witnesses refuse to attend for the purpose of giving a precognition, their attendance may be enforced. The usual course is to obtain a warrant of citation. This is usually craved in the original Petition for apprehension, but may be obtained at any subsequent stage of the proceedings. It is only in very serious cases that a warrant will be granted prior to the arrest of the accused or for the purpose of investigating some unascertained crime.¹

Illustration.—A Procurator-Fiscal presented a Petition to the Sheriff, setting forth that at a certain bazaar a lottery had been carried on in contravention of the Lotteries Act, 1823, and that the Chief Constable had endeavoured to get evidence against persons engaged in the lottery from persons able to give information, but that they refused to give it, and praying for a warrant to cite all available witnesses for precognition on oath if necessary. The Sheriff granted the warrant. Certain persons were cited and brought suspensions. The Court suspended the warrants and citations. Lord Justice-Clerk Macdonald observed: "I can conceive that in very serious cases what was done here might be resorted to, and might be useful, but it is quite inapplicable to such a case as that with which we are dealing. This is certainly a proceeding which has not been taken before in our time in ordinary cases, and I think it might tend to a very evil practice on the part of those investigating crime, to sanction it in such a case as this."²

It is, however, clear that once a criminal prosecution is in being it is the duty of every citizen to give such information to the Crown as he may be asked to give. Witnesses, whether for the Crown or for the defence, are bound to give a precognition to the other side.³

Illustration.—In a trial for murder, expert medical witnesses for the defence, acting on legal advice, declined to be precognosed by the Crown. The Solicitor-General brought the matter under the notice of the Lord Justice-Clerk (Macdonald) at the trial, with the view of obtaining an authoritative statement on the point. His

¹ *Forbes v. Main*, 1908, S.C. (J.) 46; ³ *H.M. Adv. v. Monson*, 1893, 21 R. (J.) 5; 1 Adam 114.
5 Adam 503.

² *Forbes v. Main*, *supra*.

Lordship, in the course of his opinion, said : “ I consider it to be the duty of every true citizen to give such information to the Crown as he may be asked to give in reference to the case in which he is to be called ; and also that every witness who is to be called for the Crown should give similar information to the prisoner’s legal advisers, if he is called upon and asked what he is going to say.”¹

Precognition on Oath.—Witnesses may be put on oath when deponing on precognition, but this is now a rare practice.²

How the Precognition is taken.—Each witness should be precognosced separately and outwith the presence of the other witnesses.³ The accused is not entitled to be present or to be represented at the examination.⁴ Nor is he entitled to see the precognitions, but in practice in very serious charges, such as murder, the defence is allowed to see them. The precognition should be reduced to writing and signed by the witness.

Confidentiality of the Precognition.—Crown precognitions are very highly confidential, and will be produced only in view of some great and overwhelming necessity.⁵

Illustration.—In an action of damages for defamation against a Procurator-Fiscal it was alleged that he had maliciously inserted false and calumnious statements against the pursuer which were not made by the witnesses in the precognition, relating to certain criminal proceedings, and had shown these precognitions to persons who had no legal right to peruse them. In a motion for a diligence against the Procurator-Fiscal to recover these precognitions, the Lord Advocate appeared by Counsel and objected to their production on the ground that they were confidential documents and that the public service would suffer by their production. The case of *Donald v. Hart*⁶ was founded on by the pursuer, where it was admitted for the Crown that the general rule might yield to some “ great and overwhelming necessity.” The Court refused the motion. The Lord President (Robertson), while admitting the importance to the pursuer of his recovering the precognitions, said (p. 585) : “ But it is undoubted that private rights must sometimes yield to the requirements of general public policy, and it seems to me that the essential confidentiality of communications passing between a Procurator-Fiscal and the head of the Criminal Department in Scotland is a paramount consideration.” His Lordship also held that the case was not one of “ great and overwhelming necessity,” and therefore

¹ *H.M. Adv. v. Monson*, 1893, 21 R. (J.) 5 ; 1 Adam 114.

² Hume i. 81 *et seq.* ; Dickson on Evidence, § 1590.

³ Hume ii. 82 ; Dickson, §§ 1592-3 ; *Reid v. Duff*, 1843, 5 D. 656.

⁴ Hume, *ibid.* ; Alison ii. 139.

⁵ *Donald v. Hart*, 1844, 6 D. 1255.

⁶ *Ibid.*

did not come within the scope of the exception referred to in the case of *Donald*. Lords Adam and M'Laren concurred with the Lord President; but Lord Kinnear, while not dissenting from the judgment, said (p. 588): "Now, I must own I have some doubts whether this is not a case in which the production should be ordered, since the Lord Advocate's objection is founded on the general considerations of public policy which may be applicable to the great majority of cases, but takes no account of the exceptional circumstances of the present case."¹

Witnesses suspected of Complicity.—A person who may himself be charged of the crime under investigation is not precognosed; and where a person is precognosed on oath, he cannot afterwards be charged with the crime.² Even if the precognition was not on oath, it cannot be used against the accused.³

Illustration.—In a prosecution for reset of theft, evidence was given by two police constables of statements made to them by the accused relative to his possession of the stolen property. No warning was at this time given to him, and no charge then made against him. He was subsequently used as a witness against the thief. He was told that he was not bound to incriminate himself, but no indemnity was given to him against further proceedings being adopted. He was convicted, but the conviction was quashed. Lord Justice-Clerk Macdonald said: "I think this case may be disposed of without going into the question whether the prosecutor was barred from proceeding against the appellant. That is a very difficult question, and if it were necessary to go into it, we should require to be more fully informed as to the facts and circumstances than we are at present." "I take it to be well established that no person is liable to have brought up in criminal prosecution against him at any time what he has said in precognition, not because there is any reason to suspect bad faith on the part of the prosecutor, but because the people who take the precognitions are searching for evidence in order to prove a crime, and what they take down or afterwards remember of what has been said to them is apt to be coloured by their desire to make out a good case."⁴

¹ *Arthur v. Lindsay*, 1894, 1 Adam 582.

⁴ *Cook v. M' Neill*, 1906, 8 F. (J.) 57;

² *Alison* ii. 138.

5 Adam 47.

³ *Cf.* p. 94, *infra*.

CHAPTER III

THE INDICTMENT

(1) *The General Form of the Indictment*

ACCORDING to the old practice, Solemn Procedure in the High Court proceeded on indictment and in the Sheriff Court on a criminal libel or criminal letters. Now the forms in both Courts are assimilated. The libel takes the form of an indictment in accordance with Sched. A. attached to the 1887 Act and is as follows :—

A. B. (*name and address, that given in the declaration being sufficient*), you are indicted at the instance of J. H. A. M. (*name of Lord Advocate*), Her Majesty's Advocate, and the charge against you is that on 20th 188 , in a shop in George Street, Edinburgh, occupied by John Cruikshank, draper, you did steal a shawl and a boa (add in case of previous conviction, "and you have been previously convicted of dishonest appropriation of property " or "of attempt to appropriate property dishonestly," as the case may be).

Constituent Parts of the Indictment: Naming of Accused.—Under the old practice a material error in stating the name of the accused person was generally fatal to the indictment. Such an error is still to be avoided, but it is not likely to occur in modern practice, and the powers of amendment are so wide that if the mistake did occur it could be corrected.¹ Where an accused's Christian name and surname were transposed it was held that as he had answered to the name as given he could not afterwards object.² It is sufficient to give the accused person the name and place of residence which he gave in his declaration, or, if there is no declaration, the name under which he was committed for trial.³ When he is in prison at the time of preparing the indictment he is usually designed "prisoner in the prison of"; if on bail, he is designed in the manner which he adopted in his declaration, or by the name under which he was committed for trial, if he has not emitted any declaration, and his domicile of citation is usually the office of the Sheriff Clerk.

It is unnecessary to describe the accused, or any other person named in the indictment, as "now or lately" residing at a certain place. These words are held to be implied in all designations.⁴

¹ 1887 Act, § 70; 1908 Act, § 30.

³ 1887 Act, § 4; 1908 Act, § 77 (1).

² *Poli v. Thomson*, 1910, S.C. (J.) 98;
6 Adam 261.

⁴ 1887 Act, § 13.

It is only necessary to give the name and place of residence of persons mentioned in the indictment. The trade, profession, or occupation is of no consequence, and is often omitted.

Plural Accused.—When two or more persons were charged together with committing a crime, it was necessary, in order to preserve the strict statement of the syllogism, to aver that “both and each or one or other,” or “all and each or one or more,” of them committed the crime. These alternatives are now implied, and are to be read into every indictment or complaint which charges more than one person with crime.¹

Accessories.—As an accused person is equally guilty whether he be principal or accessory, it was formerly necessary to state that he was guilty, “actor or art and part” in the commission of the crime. These words are implied in connexion with every statement of charge.² There are cases, however, where more detailed specification is requisite.

Certain crimes—rape, for example—are usually committed by one person only. Where more than one are charged, and it is not meant to be implied that both or all have committed the crime, the share taken by the accessories will be explained in the indictment. For example, it might be stated: “You the said A. B. did ravish E. F., and you the said C. D. did aid and abet the said A. B. in committing said crime by (*describe act*).”

Again, it may be necessary to bring several persons, who are involved in the same crime, to trial on separate indictments. One of them, for example, may have absconded and may not be captured until the others have been sentenced. In such a case it is usual to indicate his association with his companions by some such words as these: “You did, acting in concert with C. D. and E. F., break into the house, etc.”³

Instance.—The indictment proceeds in the name of the Lord Advocate. If at the time it is served there is no Lord Advocate in office it may proceed in the name of the Solicitor-General.⁴

Libel.—The actual charge or substance of the indictment is next set forth. The statute⁵ gives the proper formulæ to be used in regard to most of the commoner crimes. In point of form the charge consists usually of three elements, a statement of the time at which the crime was committed, a statement of the locus, and a statement of the modus. The substance of the libel is treated later.⁶

¹ 1887 Act, § 6.

² *Ibid.* § 7.

³ See as an example *H.M. Adv. v. Camerons*, 1911, S.C. (J.) 110; 6 Adam 456.

⁴ See p. 23, *supra*. *H.M. Adv. v. Lavelle*, 1914 S.C. (J.) 15; 7 Adam 255.

⁵ Sched. A. of 1887 Act.

⁶ P. 49, *infra*.

It is often convenient to use an inventory or schedule where the accused is charged with committing a large number of *similar acts* at different times and places. When this is done, the charge is stated thus: "at the times and places specified in the inventory hereto subjoined."

When several crimes are charged, *differing in circumstances*, so that an inventory would not be convenient, it is usual to abbreviate the statement of time and place in all charges after the first; for example, "time and place above libelled," or "time above libelled at," or "on at the place above libelled."

Signature of Prosecutor.—In the High Court the indictment is signed almost invariably by one of the Advocates-Depute; in the Sheriff Court the indictment concludes with the words, "By Authority of His Majesty's Advocate," and is signed by the Procurator-Fiscal.¹ The authority of His Majesty's Advocate is conveyed to the Procurator-Fiscal in the remit for trial by the Sheriff and a jury.

Citation of Documents.—It was formerly necessary to set forth in the indictment the circumstances under which the accused's declaration was emitted, and under which he had been previously convicted of crime. It is now unnecessary to specify any such particulars, the declaration and extracts of previous convictions described as applying to the accused being set forth in the list annexed to the indictment.² On the question of previous convictions we shall have more to say at a later stage.³ The labelled productions are referred to in the same manner.

Indictments Written or Printed.—Owing to the great length of the indictment and the number of copies required, in the old practice the document was invariably printed. The abbreviation of the form and the introduction of typewriting have altered this. Indictments are now frequently written or typewritten.⁴

Corrections.—It is desirable to avoid alterations upon an indictment. If corrections have to be made, these are initialled before service by the person who signed the indictment, or who could by law have signed it. Corrections on the service copy are initialled by the person who serves it. After service corrections cannot be made without the permission of the Court, and are treated in the same way as amendments, to be afterwards explained.⁵

Lists of Productions and Witnesses.—There are annexed to the indictment lists of the documents and articles which are to be

¹ 1887 Act, § 2.

⁴ 1887 Act, § 21.

² *Ibid.* § 19.

³ P. 61, *infra*.

⁵ *Ibid.* ; 1908 Act, § 30.

produced, and of the witnesses who are to be examined in support of the charge.¹ The list of witnesses contains the name and private address of each person, his occupation not being required, although there is no objection to its being inserted. It is not now necessary to qualify the address by saying, "now or lately residing at." It is not an objection to the admissibility of a witness that he has ceased before the date of the trial to reside at the address given, provided he resided there not more than six months previous to the date of trial. It is unnecessary to insert the names of witnesses to the declaration, or of witnesses to prove the application to the accused of an extract conviction. When necessary, witnesses may be examined in regard to these matters without previous notice. This necessity arises where the declaration or convictions are to be challenged. As the prosecutor must receive notice of the intention of the accused to make such challenge, he has time to cite the witnesses whom he requires.

(2) *The Substance of the Indictment ; Relevancy*

That part of the Indictment which contains the ground of the charge against the accused is called the libel. The libel consists of three elements : it must set forth (1) the time, (2) the place of the crime, and (3) the particular facts inferring guilt. In order that an Indictment may be relevant, it must meet the statutory requirements as to the specification of time and of place, and it must set forth facts sufficient to infer guilt of a crime.

Specification of Time.—Prior to the passing of the 1887 Act the prosecutor had often to take a wide latitude in stating time. The latitude covered three months.² This latitude was taken by averring that the accused did a criminal act "on the twentieth day of January 1885, or on one or other of the days of that month, or of December immediately preceding, or of February immediately following." Except as after-mentioned, it is implied in modern practice, when a date is stated in a criminal charge, that it is stated in the above terms.³ Where the crime is a continuous one extending over a considerable period, or where the prosecutor requires for some sufficient reason to take a wider latitude than three months, the time is expressed thus : "between 1st January 1885 and 30th April 1885."

Many reasons justify the prosecutor in taking a greater latitude than three months—*e.g.*, where thefts have been committed by a person in a position of trust, and where the owner of the property had not the opportunity of checking his goods and ascertaining the

¹ 1887 Act, § 35 ; *cf.* 1921 Act, § 1.

³ 1887 Act, § 10.

² Hume ii. 221 ; Alison ii. 251.

exact time at which they were missed¹; or where sheep are stolen on the hill, and a considerable period elapses between the times of counting, or where a long period has elapsed between the date of the crime and the date of trial,² or where property is not recovered till long after the commission of the crime.³

Where the prosecutor takes an exceptional latitude he must justify it. If the case goes to trial he must lead evidence to that effect. The statute does not, however, require him to state his reasons in the Indictment itself,⁴ but it would appear from some observations made in the case of *H.M. Advocate v. MacKenzie*⁵ that in extreme cases he should set forth facts sufficient to indicate why he cannot be specific as to the precise time of the commission of the crime.

Illustration.—A person was accused of stealing between 3rd July 1907 and 2nd April 1913 a book of recipes of chemical secrets belonging to his employers and with making during the same period copies of the recipes with intent to dispose of them for profit. On the subject of the latitude taken, Lord Justice-Clerk Macdonald observed⁵: "The justification of the latitude so taken, which is unprecedented, so far as I am aware, is made in argument on the ground that the book said to have been stolen was a book of recipes, and that it was taken in order to obtain copies of these recipes, and that the prosecutor does not know when the actual taking occurred. I should myself have expected that a prosecutor proposing to take such a latitude would have set forth facts to indicate his difficulty in being more precise, as, for example, that the accused was in the employment of the owners of the book during the period given, and thus had opportunities of taking possession of it without the fact of his having done so becoming known to the owners. And, certainly, if the case were allowed to go to trial, the prosecutor would have to show by his evidence that the latitude taken was not unfairly taken, and if he failed to do so his failure might lead to his not being able to obtain a verdict. While I refrain from expressing an opinion as to whether the extreme latitude of time taken should not be fatal to the charge for lack of a justifying statement, I may say that as I understand no trial is to proceed on the present Indictment without a new service, the advisers of the Crown may well consider whether, if they are to proceed further with the case, they will not frame an Indictment which may be more satisfactory in this respect. I am not prepared to cast the Indictment on this point, but it would certainly be more satisfactory, in a case so peculiar, for

¹ *H.M. Adv. v. MacKenzie*, 1913, S.C. (J.) 107; 7 Adam 189.

² *H.M. Adv. v. Macleods*, 1888, 16 R. (J.) 1; 2 White 71.

³ *H.M. Adv. v. Macdonald*, 1888, 15 R. (J.) 47; 1 White 315.

⁴ 1887 Act, § 10.

⁵ 1913, S.C. (J.) 107; 7 Adam 189.

the prosecutor to express in the Indictment the cause justifying a latitude so extreme.”

Where the exact time is of the *essence of the charge*, the date must be specifically stated, and the statutory implication does not apply. Thus, where it is an essential part of a crime that it was committed upon a certain day of the week (Sunday, for example), or at a certain time of day (as in night poaching), or at a certain period of the year (as in many game and fishery prosecutions), it is necessary to state the exact time.¹

In availing himself of the statutory provision as to implied latitude, the prosecutor must bear in mind that this provision applies only to the ordinary case where no difficulty or ambiguity can arise. In such a case he must express the latitude which he desires to take. In the ordinary case where a single date is libelled there is really no difficulty in arriving at the extent of the latitude to be implied. Suppose an Indictment bear that the crime was committed on 15th October, the implied latitude covers September, October, and November. But where a prosecutor libels two dates, as, for example, when a crime is said to have been committed between 15th October and 15th November, the question immediately arises how is the three months' latitude to be calculated. Is it the whole months of October and November with the addition of September or of December or of both these months, or is it a period of three months calculated from the middle of the express period? It has accordingly been held that where a prosecutor libels two dates as the limits within which the crime was committed, he cannot take advantage of the implied latitude allowed by the statute.²

Illustration.—In an Indictment under § 5 of the Criminal Law Amendment Act, 1885, which could not then be prosecuted after the lapse of three months, the offence was said to have been committed between 14th January and 6th February 1904 (the particular date being to the prosecutor unknown). At the trial, it appeared that the offence was committed in the month of December 1903. The Sheriff directed the jury that they were entitled to bring in a verdict of “guilty as libelled,” provided they found that the assault had been proved subsequent to 11th December 1903—that being within three months of the serving of the Indictment. The jury brought in a verdict of guilty as libelled. In a suspension, held that the prosecutor, by limiting himself as regards time in the manner specified, had debarred himself from taking advantage of the wider latitude allowed by § 10 of the 1887 Act. The conviction was quashed. Lord Stormonth Darling observed: ³ “Now, what the statute declares to be implied is ‘the latitude now in use to be taken

¹ 1887 Act, § 10; *Drummond v. Latham*, 1892, 3 White 166; *Macdonald v. Patterson*, 1894, 21 R. (J.) 38; 1 Adam 366.

² *Creighton v. H.M. Adv.*, 1904, 6 F. 72; 4 Adam 356.

³ *Ibid.*

in Indictments,' and this refers us to the practice in existence before the 15th October 1887. The first thing to be noted with reference to that practice is that the latitude was always express. Sometimes in crimes of an occult or continuing character it extended to a period of months or even years. In any event, the latitude being always carefully expressed, the accused person could have no difficulty in knowing the precise length of time over which the evidence for the prosecution might extend, and he could take objection before the case went to trial, if so advised. Under the existing law it is still quite competent for the prosecutor to express the latitude which he intends to take. The 10th section of the Act of 1887 nowhere forbids that. It merely abolishes the necessity of setting out at length words which had come to be words of style, where to imply them could raise no ambiguity and cause no prejudice to the accused. While, therefore, the framer of an Indictment is quite right to avail himself of the latitude implied by § 10, wherever it is quite simple to ascertain the limits of time by implication, it is, in my judgment, a misuse of the section to trust to the implied latitude in any case where to do so may create an ambiguity. In all such cases the proper course is to express the latitude which the prosecutor desires to take."

Specification of Locus.—As regards *place*, it has to be kept in view that, as the *locus delicti* in the ordinary case fixes the jurisdiction of the Court, the specification of locus is essential.¹ The statement of place in a criminal charge has always been closely scrutinised. Where necessary, a considerable latitude was taken by describing the *locus delicti* as "at or near" or "in or near" a particular place, "or in the near neighbourhood thereof." Such qualifications are now implied.² Prosecutors should adhere to the simple forms authorised by the statute wherever possible and should avoid phrases such as "elsewhere to the prosecutor unknown," unless the circumstances render them necessary.³

It is usual, where the spot is outside a burgh, to mention the parish in which it is situated. Where a case is in the Sheriff Court, it is proper to mention the county, as by doing so it is made manifest that the *locus delicti* is within the jurisdiction of the Court. Where the locus is within a burgh, it is sufficient to mention the street and the burgh, without further specification.⁴ If there happen to be two places of the same name in a parish, or two streets of the same name in a burgh, care must be taken to distinguish which is meant.

Great latitude will be allowed in stating the place, where the

¹ Hume ii. 209; *M'Millan v. Grant*, 1924, J.C. 13.

² 1887 Act, § 10.

³ *Gold v. Neilson*, 1908, S.C. (J.) 5; 5 Adam 423, per Lord Justice-Clerk Macdonald.

⁴ Alison ii. 60.

circumstances require this. In charges of embezzlement and theft, in which it is usually known where the accused person received or found the stolen property, but it is often not known where he appropriated it, and in similar cases, such as reset,¹ the prosecutor is allowed to state the *locus delicti* in very broad terms. He may even take a whole county.

There are certain crimes and offences of which the essence consists in the act being done in a certain place. Under these circumstances the exact locus must be stated, and no latitude is implied.²

Illustration.—The Street Betting Act, 1906, enacts:—§ 1 (1) “Any person frequenting or loitering in streets” for betting purposes shall be liable to certain penalties. (4) “Street shall include any public passage.” § 3. “In Scotland ‘passage’ includes common close” Held that a charge of loitering “in a close” (without the prefixed adjective “common”) was not a relevant charge under the statute.³

Illustration.—A police Act enacted that every known or reputed thief who was found in any street with intent to commit any crime might be apprehended. An accused person who was apprehended on a tramway car maintained that he was not thereby on a street. The contention was rejected.⁴

Where the circumstances of the offence charged make it necessary to take an exceptional latitude in regard to time or place, it is not necessary in the Indictment to set forth such circumstances, or to state that the particular time or the particular place is to the prosecutor unknown. The Court has power in such a case, if satisfied that such exceptional latitude was not reasonable in the circumstances of the case, to give such remedy to the person accused, by adjournment of the trial or otherwise, as shall seem just.⁵

Where an offence has been committed on or near the boundaries of two jurisdictions, or where the same person has committed several offences in different counties, it is necessary to keep in mind the extensive powers conferred by the 10th section of the Summary Jurisdiction (Scotland) Act, 1908, which apply to procedure by Indictment as well as complaint.⁶

The prosecutor in libelling the locus must give the accused person a sufficiently precise definition of it to enable him to prepare his defence. The test of sufficient specification is really fairness and adequate notice of the precise offence charged. These requisites

¹ *Gold v. Neilson*, *supra*; *M'Intosh*, 1831, Bell's Notes 213; *Wilkinson*, 1835, Bell's Notes, 213.

² 1887 Act, § 10.

³ *Winning v. Jeans*, 1909, S.C. (J.) 26; 6 Adam 1.

⁴ *Martin v. M'Intyre*, 1910, S.C. (J.) 72; 6 Adam 252.

⁵ 1887 Act, § 10. See *H.M. Adv. v. MacKenzie*, 1913, S.C. (J.) 107, and p. 50, *supra*.

⁶ P. 5, *supra*.

are well illustrated by two cases in which the charge was exceeding the speed limit over a certain distance.¹

Specification of the *Modus*.—This is the operative and crucial part of the Indictment. Here the prosecutor must set forth the facts and circumstances of the crime charged. The facts and circumstances so set forth must be such as to infer guilt of some crime known to the law. If such specification be lacking the Indictment is irrelevant.

There is one safe rule for ensuring the relevancy of Indictments and that is to adhere to the forms given in the 1887 Act. These forms cover practically all the ordinary crimes and it is rare for circumstances to arise where one of these forms or a simple adaptation of one does not suffice. The whole object of the 1887 Act was to simplify the cumbrous form of the earlier Indictment and to substitute for its complications the straightforward formulæ at present in use. It is when the prosecutor deviates from the simple forms prescribed that difficulties as to relevancy arise. He should keep in mind the dictum of Lord Rutherford Clark that the meaning of the Act of 1887 is that specification is to be avoided as far as possible.²

Illustration.—A charge in the following terms was held irrelevant : “Having on 14th November 1887, within the inn at Dunvegan, found in money one pound, you did deny having found the same and did appropriate and thus steal the same.” Lord M'Laren said : “Under the recent statute it is perfectly clear that a case of this description might have been tried on a complaint which simply set forth that the accused did steal a £1 note, without stating that the note was the property of anyone. But it appears to me, on a fair reading of the charge, that the Procurator-Fiscal has not availed himself of the abridged forms provided by the new statute, and that in framing this charge he has undertaken to set forth a circumstantial case of theft, defining the charge by circumstances of time and place, such as are essential to a relevant charge under the old form. The charge states [quotes charge]. Now, in my opinion that is not a relevant charge of theft, because everything set out might be true, and yet the accused might not be guilty of theft.”³

The method of reform adopted by the framers of the 1887 Act was first of all to provide this simplified statutory form and then to go on to provide that all the various embellishments which had formerly appeared in the old Indictment were either unnecessary or must be held as implied. The result is that much of the statute is negative rather than positive in effect. In order fully to understand the various improvements it is necessary to keep in mind the

¹ *Christie v. Stevenson*, 1907, S.C. (J.) 100; 5 Adam 382; *Connell v. Mitchell*, 1909, S.C. (J.) 13; 5 Adam 641.

² *Bewglass v. Blair*, 1888, 15 R. (J.) 45; 1 White 574.

³ *Campbell v. M'Lennan*, 1888, 15 R. (J.) 55; 1 White 604.

old form of Indictment.¹ The effect of the Act has, therefore, to some extent been to perpetuate the memory of an old form which would be better forgotten. The method adopted was, no doubt, necessary to explain the new procedure to a practitioner familiar with the old. At the present time, however, once a prosecutor has realised the necessity of adhering to the simplified statutory form he is unlikely to fall into the mistakes which faced his predecessors. The chief simplifications of the old procedure are as follows :—

Nomen Juris Unnecessary.—The prosecutor need not state specifically the *nomen juris* of the crime alleged. It is enough if the facts set forth in the libel are relevant and sufficient to constitute what is recognised by the law of Scotland as an indictable crime.² There may be crimes which have no proper *nomina juris* at all.

Qualifying Words.—It is unnecessary to charge an act as done, or omitted to be done, “wilfully,” or “maliciously,” or “wickedly and feloniously,” or “falsely and fraudulently,” or “knowingly,” or “culpably and recklessly,” or “negligently,” or “in breach of duty”; or to use such phrases as “knowing the same to be forged,” or “having good reason to know,” or “well knowing the same to have been stolen.” These and similar words and expressions are now implied in every case where their insertion is necessary to make the Indictment relevant.³ They are not to be inserted in a criminal charge unless there is a special reason.⁴ In one case,⁵ a case of fraud, where the words “falsely and fraudulently” were inserted instead of being left to be implied, Lord Justice-Clerk Macdonald observed :

¹ The old form of Indictment does not require comment, as its severely logical form makes its scope immediately apparent. The modern form is really a short *resumé* of the crucial facts, the various logical steps whereby these facts are brought within the ambit of the criminal law being implied.

² 1887 Act, § 5. *Bewglass v. Blair*, 1888, 15 R. (J.) 45; 1 White 574. The old form of Indictment was a syllogism in which the major proposition stated that a certain *nomen juris* was “a crime of a heinous nature and severely punishable.” In the minor proposition it was stated that the accused person had committed certain acts which amounted to the crime specified in the major proposition, and that he was therefore liable to suffer the pains of law. In special circumstances it was difficult to frame a *nomen juris* which exactly covered the criminal acts done by the

accused person, and a failure of justice not uncommonly was the result.

³ In the old form of Indictment it was necessary to set forth every circumstance qualifying the act done by the accused, which it was intended to establish by proof. The mere fact that a man has done a certain act of a criminal nature does not necessarily imply that he has committed a crime. He may take the property of another and yet not steal it. He may have taken it in justifiable error, or believing that he had a right to do so. It is therefore required that a man’s actions shall have the qualification which implies criminality; otherwise he cannot be charged with crime in respect of these actions.

⁴ 1887 Act, § 8.

⁵ *Lloyd v. H.M. Adv.*, 1899, 1 F. (J.) 31, at 35; 2 Adam 637.

“ I do think it is a pity that prosecutors do not take advantage of the statutory authority to omit from the charge such words as ‘ falsely and fraudulently,’ because if they insert them in one part of the charge and omit them in another, it may raise a doubt as to whether they are intended to be implied in the latter.” In charges of fire-raising it is necessary to add, “ and this you did wilfully,” or “ and this you did culpably and recklessly,” because there are two distinct crimes which fall under the general name of fire-raising. In like manner, in such charges as malicious mischief, where it is possible that the accused may have had no criminal intent, it is often expedient to say, “ you did maliciously and mischievously ” do the act charged. There may be other cases where by implying one set of qualifying words one crime would be charged, while if another set were implied, another and a different crime would be charged.¹

Illustration.—The accused were charged with culpable homicide, the libel, after setting forth the facts, concluding thus : “ and did thus kill A. F., W. F., and A. S.” Objection was taken to the relevancy, *inter alia*, on the ground that the acts set forth should have been characterised as having been done “ culpably ” or “ recklessly.” The Lord Justice-Clerk (Macdonald) repelled the objection, and in the course of his opinion, after quoting the form given in the schedule of the Act as illustrating a case of culpable homicide, said : “ If the Act declares that a charge may be made in this form, is it to be said that the public prosecutor is not to use that form ? The question then arises whether this Indictment is in the form prescribed by the Act. I think it is. It is not disputed that if the words ‘ culpably and recklessly and in breach of your duty ’ were in the Indictment the charge would be relevant. But by § 8 they are to be implied. The charge in the form in Sched. A., taken along with § 8, is that the accused did guiltily and not innocently act as there described. The charge here is that the accused did guiltily and not innocently do, or fail to do, certain acts libelled. The prosecutor undertakes to prove, according to what is required by law, the guilty character of the acts alleged to have been done. It is the responsible public prosecutor alone to whom the privilege of thus libelling is given. He, on his own responsibility, indicts and accuses of crime. The statute declares that the acts he specifies are to be read as being alleged to be done contrary to the criminal law of the country, and that, if the charge with certain words read in would have been sufficient under the former law to make a relevant accusation, they shall be read in. Obeying the statute, I read them in here. It is not disputed—indeed, counsel frankly admitted—that if these words were written in, the Indictment would be relevant. The statute says they shall be implied. That means that, for the

¹ *H.M. Adv. v. Swan*, 1888, 16 R. (J.) 34 ; 2 White 137, *per* Lord Adam.

purposes of relevancy, they are in. I have only to add, on the question of relevancy, that Lord M'Laren refers to one case in which the qualifying word 'wilfully' is used in the schedule, in support of his view. But that is just the exception which proves the rule, instead of being, as he suggests, an illustration in favour of his dictum. There are but few cases where the same act described in the same words may constitute one or other of two crimes, where it will not also be the case that a description of the act in ordinary words without adjectives will set forth the difference clearly enough—as, for example, between murder and causing death without murderous intent. But there are certain cases in which general words will not indicate any difference. The case of crime by raising fire is one of these. To say that a man sets fire to a house gives him no notice whether he is accused of malicious crime or only of criminal carelessness. In such a case, therefore, where the same general words apply either to an offence of great malignity and deliberate criminality, or to an offence in which there was no wicked intent, but only punishable carelessness, the schedule indicates that, if the higher offence is to be charged, this intention shall be given notice of. But here, in this case, and in most other cases, no such ambiguity exists, and there is no need for the specification given in the case of fire-raising. That case, by its exceptional character, brings into relief other cases in the schedule in which no such words are used, and the statute expressly declares that Indictments may be framed according to the forms in the schedule."¹

The Court has, however, in dealing with § 8 of the 1887 Act, come reluctantly to the conclusion that except in cases like fire-raising, and possibly one or two others, qualifying words are unnecessary. This reluctance has shown itself chiefly in fraud cases where it is possible to have an Indictment which does not inform the accused person in so many words that he is accused of fraud. It was pointed out in one case that the accused person would require a lawyer at his elbow to tell him that the words which really carried the gravamen of a criminal charge were implied by the statute.²

Illustration.—An advertising agent was charged on a complaint that he did "pretend" to a female shop assistant that her employer paid yearly for an advertisement in a directory, and "did thus induce" the shop assistant to pay him 1s. 6d., and did thus defraud her of that amount. Objection was taken to the complaint that in the absence of an averment that the statements made by the agent were false, the complaint set forth no offence known to the law. The objection was repelled, it being held that the words "falsely and fraudulently" must be taken as implied.³

¹ *H.M. Adv. v. Parker and Barrie*, 50, at 54. See also *H.M. Adv. v. Swan*, 1888, 16 R. (J.) 34; 2 White 137.

² *Gallagher v. Paton*, 1909, S.C. (J.) ³ *Gallagher v. Paton*, *supra*.

The 8th section of the 1887 Act has, however, been pressed further. Where a statute defines an offence with the aid of qualifying words, it is unnecessary in libelling the offence to insert the statutory qualifying words, but these may be implied.¹

Illustration.—§ 7 of the Conspiracy and Protection of Property Act imposes a penalty on every person who does certain acts “wrongfully and without legal authority.” A complaint omitted the words “wrongfully and without legal authority.” Objection was taken to the relevancy on the ground that these words were essential to the statutory offence. It was held that the words, “wrongfully and without legal authority” were implied under § 8 of 1887 Act. Lord Justice-Clerk Macdonald said: “I do not think it was necessary to put these words into the charge, because under § 8 of the Criminal Procedure Act, 1887, such qualifying words do not require to be inserted. It was for the accused, if he could show that he had not acted wrongfully and without legal authority, to bring that forward as his defence, and, if proved, it would be a sufficient defence. At the same time it is advisable that these words, since they appear in the statute, should be inserted in a complaint charging the statutory offence.”²

It does not follow, however, that § 8 may be invoked to give a criminal complexion to all and every set of facts. So where the charge was that the accused “from a shed in the occupation of C. F., did sell to P. 1½ cwt. of lead the property of W. F., and did thus steal the said lead,” it was held that even if qualifying words were implied it would be impossible to make it relevant as a charge of theft.³

Quotation of Statutes.—It was usual to extract *verbatim* the terms of the Act of Parliament creating the offence charged. This lengthened the Indictment and introduced risk of error. In modern practice the Act of Parliament alleged to have been contravened is referred to by its short title, and the particular section of it which creates the offence is particularly specified: thus, “Contrary to the Night Poaching Act, 1828, § 1.”⁴

Quantities, Persons, Things, and Modes.—As the logical conclusion, that an accused person was guilty of the major proposition, depended upon proof of the facts stated in the minor proposition, *and of no other facts*, it was impossible for the prosecutor to found upon any fact which he happened to prove, but which was not covered by the statement in the Indictment. To bring all such facts within the strict letter of the Indictment, it was necessary for the prosecutor

¹ *Stuart v. Clarkson*, 1894, 22 R. (J.) 5; 1 Adam 466; 1897, 2 Adam 296.

² *Stuart v. Clarkson*, *supra*.

³ *Smith v. Sempill*, 1911, S.C. (J.) 30; 6 Adam 348.

⁴ 1887 Act, § 9.

to qualify every statement by means of an alternative, more or less vague, and capable of covering anything which was likely to emerge at the trial. In this way, if any fact so emerged which was not exactly consistent with the precognition, he could, nevertheless, adduce it in support of his minor proposition. Thus, all weights and measures were qualified by the words "or thereby," and no quantity, person, thing, or mode was mentioned without stating as an alternative some other quantity, person, thing, or mode "to the prosecutor unknown." In modern practice, the prosecutor states the exact fact which he intends to prove, and the latitude to which we have referred is implied by the statute.¹ But the latitude allowed by the statute does not apply to cases where precision is of the essence of the charge. So where an act is a criminal offence only because of the fact that the person injured is below the age of puberty, the prosecutor should set forth distinctly the age of the person and the mere addition of figures in brackets after the person's name is insufficient.²

In the case of a crime which infers interference with anything—buildings, goods, money, or other subject—which is not the property of the accused, it is unnecessary to state specifically the person to whom such property belongs. An allegation is further implied that such subjects are not the property of the accused, in all cases where such implication is essential to the criminality of the charge.³

Illustration.—A charge in the following terms was sustained as relevant: "You did break down and remove from its place a quantity of wire fencing part of the boundary fence of the farm of Aignish, Stornoway"; and the objection repelled that the facts did not set forth an indictable offence, as the fence in question might belong to the accused or he might be acting for the owner.⁴

Description of Persons and Goods.—To meet the contingency of a person mentioned in the Indictment or in the list of witnesses, etc., having changed his residence, it was necessary to qualify all addresses by stating that the person "now or lately" resided there. It is now sufficient to describe any person by his name and ordinary address, the alternative being implied.⁵

In the ordinary case it is also sufficient to describe any article in general terms without specifying material; for example, it is proper to say "a watch," not "a gold watch," or "a shawl," not "a silk shawl." But where the crime consists in an act relating to an article of a *particular* kind, it is still necessary to state that the article was of

¹ 1887 Act, § 11.

³ 1887 Act, § 12.

² *Lockwood v. Walker*, 1910, S.C. (J.)
3; 6 Adam 124.

⁴ *H.M. Adv. v. M'Leod*, 1888, 2 White 9.

⁵ 1887 Act, § 13.

the nature constituting the crime, *e.g.*, counterfeiting "gold coin" or "silver coin."¹

Money.—It was formerly necessary, in mentioning a sum of money, to specify whether it consisted of gold, notes, silver, copper, Post Office orders, or the like. It is now sufficient to say, "five pounds fifteen shillings of money," without further specification.²

Documents.—According to the former practice, when a document was referred to it was quoted more or less extensively. It is now sufficient to use a general description, and, if the document is one of the productions, to specify its number in the list.³

Charges of Dishonesty.—In framing an Indictment on charges inferring dishonest appropriation of property some special considerations have to be kept in mind. Criminal resetting of property is not now limited to the receiving of property taken by theft or robbery.⁴ It extends to the receiving of property appropriated by breach of trust and embezzlement, and by falsehood, fraud, and wilful imposition. In an Indictment charging the resetting of property dishonestly appropriated by any of these means, it is not necessary to set forth any details of the crime by which the dishonest appropriation was accomplished; but it is sufficient to set forth that the person accused received such property, it having been dishonestly appropriated by theft, or robbery, or breach of trust and embezzlement, or falsehood, fraud, and wilful imposition, as the case may be.⁵

It is also necessary to consider the extended powers of the jury, which enable them to bring in a verdict convicting the accused of a crime different from that charged in the Indictment. This obviates the necessity of inserting in the Indictment a number of alternative charges, as was customary in the old practice.⁶

In libelling previous convictions as aggravations, the rules on that subject explained at the end of this chapter must be kept in mind.

Illustration.—A panel was charged with reset of theft, libelled thus: "During the period between 1st July 1907 and 3rd March 1908, in on different occasions during said period, the particular occasions being to the prosecutor unknown, you did reset in all 25 lbs. of brass and copper electric and gas fittings and 25 lbs. of solder, the same having been dishonestly appropriated by theft." The panel was convicted by a jury and sentenced to four months'

¹ 1887 Act, § 13.

⁴ 1887 Act, § 58.

² *Ibid.* § 14.

³ *Ibid.* § 15. See *H.M. Adv. v. Parker and Barrie*, 1888, 16 R. (J.) 5;

⁵ *Ibid.*

2 White 79.

⁶ P. 107 *sq.*, *infra*.

imprisonment. He brought a suspension alleging that the Indictment was irrelevant as not giving him fair notice of the charge he had to meet, and founding on the case of *Macdonald* (1888), 1 White, 593, decided by Lord Trayner at Glasgow Circuit. Suspension refused. Lord Justice-Clerk Macdonald said: "Now here we have a case in which the prosecutor says [quotes charge]. That would be sufficient specification in charging thieves, and I cannot see why it should not be sufficient in the case of a resetter. There is no doubt that the Indictment is in accordance with the forms prescribed by the Criminal Procedure Act, 1887. With regard to the case of *Macdonald*, I am bound to say that, having carefully considered the judgment of Lord Trayner, I do not understand his reasoning. Under the Criminal Procedure Act, 1887, such words as 'the particular occasion being to the prosecutor unknown' are unnecessary. Where it is alleged that an act has been done on a number of occasions, without the particular occasions being specified, it is implied that the particular occasions are unknown." ¹

(3) *Previous Convictions*

A distinction falls to be made between the libelling of a first conviction as an aggravation for the purpose of bringing it under the notice of the judge who might try the case for his consideration in determining whether he should pronounce the maximum sentence for a second offence, or a lesser, and the quite different case where a statute imposes different penalties in the case of a first offence, a second offence, and in third or subsequent offence. In the latter class of case, the previous conviction is not a mere aggravation which may affect the sentence but a substantive part of the offence charged. In statutory charges where the aggravation founded on is a substantive part of the offence, it must be a previous conviction under the same and not an analogous statute.²

When, however, the term previous conviction is used, the former of these two senses is usually understood. As a general rule it may be said that any conviction of a crime or offence, whether at common law or constituted by statute, may be libelled as an aggravation of a repetition of the same crime or offence. It does not affect the merits of the crime or offence for which the accused is actually being tried, but it falls to be taken into consideration by the judge in giving sentence. It is, however, incompetent to libel a previous conviction which is at the moment under appeal.³

¹ *Maguire v. H.M. Adv.*, 1908, S.C. (J.) 49; 5 Adam 539.

³ *M'Call v. Mitchell*, 1911, S.C. (J.) 1; 6 Adam 303.

² *Hefferan v. Wright*, 1911, S.C. (J.) 20; 6 Adam 321.

By statute certain convictions of one class of crimes are competent as aggravations of any other crime of that class.

Crimes inferring Dishonesty.—Extracts of previous convictions obtained in any part of the United Kingdom of (1)—robbery; (2) theft; (3) stouthrief; (4) reset; (5) forgery and uttering forged documents; (6) falsehood, fraud, and wilful imposition; (7) house-breaking with intent to steal; (8) assault with intent to rob; (9) breach of trust and embezzlement; (10) burglary; (11) larceny; (12) obtaining goods or money by false pretences; (13) swindling; (14) cardsharpping; (15) attempts to commit any of these crimes; (16) crimes contrary to the Acts of Parliament relating to the King's coinage; (17) crimes relating to the King's coinage at common law; (18) crimes inferring dishonest appropriation by post office officials or attempts to commit such crimes, whether such convictions be under the Post Office Acts or at common law; (19) all other crimes inferring dishonest appropriation of property by a person not the owner thereof, or attempts to commit such crimes, whether in contravention of any Act of Parliament or at common law—may be lawfully put in evidence as aggravations against any person accused on indictment or complaint of any of the crimes or attempts to commit crimes above set forth. Any aggravation of the crime or attempt which such extract conviction bears to have been found proven may be lawfully used in evidence to the like effect.¹ But in a case² where an Indictment charged theft by housebreaking aggravated by previous convictions of attempts to appropriate property dishonestly and the list of productions annexed to the Indictment specified certain previous convictions under the Prevention of Crimes Act, 1871, § 7, of being found in a place with intent to steal, it was held that these were not previous convictions of attempts to appropriate property dishonestly and so did not fall within the section. For the information of the Court, every extract conviction for dishonesty ought to specify the nature of the property appropriated.³

A conviction in any part of the United Kingdom of any offence inferring dishonesty may be libelled as an aggravation of any offence inferring dishonest appropriation of property or attempt thereat.⁴

In a charge of robbery, previous convictions both of dishonesty and violence may be libelled as aggravations.

Crime Inferring Personal Violence.—Extracts of previous convictions of any crime inferring personal violence obtained in any part of the United Kingdom may be lawfully put in evidence as

¹ 1887 Act, § 63.

² *H.M. Adv. v. Coggans*, 1906, 8 F. (J.) 109; 4 Adam 635.

³ *M'Kenzie*, 1836, 1 Swin. 299;

H.M. Adv. v. Wylie, 1873, 2 Coup. 428.

⁴ 1908 Act, §§ 34 (7) and 77 (4).

aggravations of any crime inferring personal violence. Any aggravation set forth in such extract convictions may be lawfully used in evidence to the like effect.¹

Crime Inferring Lewd Conduct.—Extracts of previous convictions obtained in any part of the United Kingdom of any crime inferring lewd, indecent, or libidinous conduct may be lawfully put in evidence as aggravations of any crime of a lewd, indecent, or libidinous character. Any aggravations set forth in such extract convictions may be lawfully used in evidence to the like effect.²

Disorderly Conduct.—A conviction of any offence inferring disorderly conduct or a breach of public order may be libelled as an aggravation of any other offence inferring disorderly conduct or a breach of public order.³

Statutory Contraventions.—The Legislature has removed the doubt as to whether previous convictions of statutory contraventions can be libelled as aggravations of similar offences. Previous convictions of any statutory offence may now be libelled as aggravations in any subsequent charge for the same kind of offence or any analogous offence.⁴

Previous Convictions obtained in the Irish Free State.—As has been mentioned, those previous convictions which may be founded on are such as have been obtained in the United Kingdom. It is not quite clear what the position is with regard to the Irish Free State. "United Kingdom," as used in the Prevention of Crimes Act, 1871, is to be construed as including the Irish Free State according to the Irish Free State (Consequential Adaptation of Enactments) Order, 1923,⁵ but no reference is made to the 1887 Act or to the 1908 Act.

¹ 1887 Act, § 64.

² *Ibid.* § 65.

³ 1908 Act, §§ 34 (7) and 77 (4).

⁴ *Ibid.*

⁵ S.R. & O. 1923, p. 400, § 2 and schedule.

CHAPTER IV

PROCEDURE PRIOR TO TRIAL

AFTER the Indictment has been prepared and signed, many important steps have to be taken before the trial. Some of these matters arise at an earlier, and some at a later stage, but it will be convenient to consider them in this chapter. In the first place, by service of the Indictment, the accused person has to be informed of the charge made against him, and of the nature of the evidence by means of which it is to be supported. The prosecutor has further to see to the lodging of all documents and productions which are to be used at the trial. The agent of the accused has to give notice of any special defence which his client intends to plead. If the accused is not to plead guilty, witnesses for both parties, and a sufficient number of jurors, will have to be cited. Not infrequently valuable evidence is likely to be lost by the death of a witness, and a dying deposition must be taken. It is also necessary at this point to explain the provision made by the Legislature to prevent undue delay in bringing accused persons to trial, and to consider the steps to be taken where a witness has been lodged in prison, or has absconded.

1. *Fixing the Diets*

First Diet and Second Diet.—With the exception of special cases falling under § 31, two diets are fixed in all trials upon Indictment. These are usually called the First or Pleading Diet, and the Second or Diet of Trial. The first diet must not be less than six clear days after the service of the Indictment; the second diet not less than nine clear days after the first diet.¹

The second diet is always called in the Court which has jurisdiction to try the accused. In High Court cases it is fixed for Edinburgh or a circuit town; in a Sheriff Court case it is fixed for the seat of the Court which has jurisdiction to try the charge.

The first diet is more variable. In virtue of the Prisons Acts, many sheriffdoms have no prison within their boundaries. In this case committed prisoners have to be sent to a prison in another sheriffdom. The statutory rule is this: If a person accused is confined in prison, the first diet is called in the Sheriff Court which is nearest to that prison. If the accused person has been liberated on bail, it is called in the Sheriff Court of the district in which is situated his domicile for citation as set forth in his bail bond. In

¹ 1887 Act, § 25.

any other case it is called in the Sheriff Court within the jurisdiction of which the crime is alleged to have been committed in whole or in part.¹

These rules occasionally create difficulty. If two persons are indicted, one of whom has been liberated on bail, and the other remains in prison, there may have to be two first diets. For example, A. and B. have been committed for trial at Cupar-Fife. There being no prison in Cupar, A. has been transmitted to the prison of Dundee, while B. has found bail, and accepted the Sheriff Clerk's office at Cupar as his domicile of citation. The first diet for A. will be in the Sheriff Court of Forfarshire at Dundee; that for B. in the Sheriff Court of Fifeshire at Cupar. Seeing that the principal Indictment must be produced at each first diet, separate dates or hours must be fixed in such a manner as will allow time for the transmission of the papers from one Court to another.

2. *Citation of Persons Accused, Witnesses, and Jurors*

Warrant of Citation.—When a sitting of the Sheriff Court, or of the High Court of Justiciary, has been appointed to be held for the trial of persons accused on Indictment, the Sheriff Clerk of the district in which the second diet is to be called, or the Clerk of Justiciary, according as the trials are to take place in the Sheriff Court or High Court, issues a warrant for citation in the form of sched. B. annexed to the 1887 Act.² This warrant authorises officers of law to cite persons accused, witnesses, and jurors. The respective forms of Citation and Execution of Citation are given in scheds. C., D., E., F., and G. Such warrant, authenticated by the signature of the Clerk, or a duly certified copy of it, is a sufficient warrant to all officers competent.³

One warrant suffices for all the trials which are to take place at the same diet. A warrant is not necessary where the accused person has given intimation through his agent, in terms of § 31 of the 1887 Act, that he intends to plead guilty and wishes to have his case disposed of at once. The warrant specifies the date fixed for the trial of the case, and indicates the first or pleading diet either by inserting the date of it (which is the better method), or by stating the number of clear days which are to intervene between the first and second diets.

Service.—Service of the Indictment and lists, and of notices or intimations to persons accused, and citation of witnesses, whether for precognition or trial, may be made or given by any macer, messenger-at-arms, sheriff officer, or officer of police. Where the

¹ 1887 Act, § 26.

² See p. 312, *infra*.

³ *Ibid.* § 23.

accused is in prison at the time of service on him, service is made by the governor, deputy-governor, or a warder of such prison.¹

The officer must be duly vested in his office, but it is not necessary for him to have the warrant of citation in his possession at the time of service.² Where a panel objected that he was not competently before the Court, because the officer who had cited him had never had in his possession or seen the warrants to cite, it was held that as he had suffered no prejudice the trial could go on.³

A full copy of the Indictment and lists is delivered to each accused person, having attached to it a citation in the statutory form furnished in scheds. F. and G.⁴ The citation is signed by the officer and one witness, except in cases under § 31, where no witness is required. The signature of the prosecutor on the principal Indictment must be noted on the copy at the end of the Indictment, and of each list.

It is desirable that the Indictment should be served either upon the accused *personally*, or by leaving it at some place which he has accepted as his domicile of citation. There is seldom any difficulty on these points. If the accused is in prison, he is of course served personally; if he is on bail, his bail bond specifies a place where service is to be made. In the rare cases where he is neither in prison nor on bail, service should be made personally, if he can be found; and if he cannot be found, the copy should be left at his dwelling-house in the hands of a member of the family or a domestic servant.⁵ If access to his house cannot be got, the copy is fastened to the most patent door.⁶

If he has absconded, service is made at his last known residence.⁷

Error.—In the event of a material error being discovered in the copy, the proper course is to serve the Indictment anew, unless the portion affected by the error can be dispensed with. An error only affects the part in which it occurs, and if that portion can be deleted it is not necessary to serve the Indictment anew.⁸ Trivial errors are not regarded, and it may be remarked generally that objections to the service copy must be stated at the first diet, and will not be afterwards entertained.⁹

3. Lodging Productions for Prosecution

The Criminal Procedure Act, 1921,¹⁰ has made it competent for the prosecutor to put in evidence at the trial productions not included in the lists lodged by him, provided he obtain the leave of the Court

¹ 1887 Act, § 24.

² 9 Geo. IV. c. 29, § 7; Alison ii. 327.

³ *H.M. Adv. v. Bryson*, 1910, 6 Adam 203.

⁴ 1887 Act, § 25.

⁵ Hume ii. 252; Alison ii. 328.

⁶ Hume ii. 254; Alison ii. 332.

⁷ 1887 Act, § 26.

⁸ Hume ii. 246; Alison ii. 315.

⁹ 1887 Act, § 33.

¹⁰ 11 & 12 Geo. V. c. 50.

to do so. This provision, however, does not absolve the prosecution from carrying out the provisions of the 1887 Act with regard to lodging productions.

Record Copy of Indictment and Extract Convictions.—The record copy of the Indictment and any extract convictions that are to be produced in evidence must be lodged with the Sheriff Clerk of the district in which the Court of the first diet is situated, on or before the date of service of the Indictment. At the same time a copy of the lists of witnesses and productions must be lodged with the Sheriff Clerk of the district in which the Court of the second diet is situated. In practice this is done by lodging a full copy of the Indictment and lists. Where a person accused is indicted for fugitation, the lists are lodged in the Justiciary Office.¹

No provision has been made for the case of there being more than one first diet in the circumstances already mentioned. The proper course in such case is to lodge the documents with the Sheriff Clerk of the Court in which the earliest first diet has been fixed, and to transmit them successively to the Courts where the other persons accused are to plead.

Other Productions.—As regards the other productions, the accused is entitled to see them in the office of the Sheriff Clerk of the district in which the Court of the second diet is situated, or, where that diet is to be in the High Court of Justiciary at Edinburgh, in the Justiciary Office.²

It is usual to lodge all *documentary* productions for the prosecution, conform to the list annexed to the Indictment, along with the record copy Indictment. The *non-documentary* productions, often called the labelled productions, in a Sheriff Court case, are lodged in the hands of the Sheriff Clerk of the second diet either at the time of service of the Indictment, or more frequently immediately after the first diet; but they may be lodged as late as the day before the second diet.³ Where it is convenient to do so, it is better to lodge them after the accused pleads not guilty at the first diet.

Where a person is indicted for the High Court of Justiciary, all productions, documentary and non-documentary, are lodged with the Clerk of the Court of the first diet *before the first diet*. If the agent for the defence makes a written request to the Procurator-Fiscal that the non-documentary productions should be left for his inspection at some convenient Court-house other than that of the first diet, they may be left at such place until shortly after the first diet.

¹ 1887 Act, § 27.

² *Ibid.* § 37.

³ Act of Adjournal, 17th March 1827; *Craig v. Galt*, 1881, 4 Coup. 541. This

decision is prior to the 1887 Act, and it may be that the Act of Adjournal is impliedly superseded by the 1887 Act.

Care must be taken when transmitting the non-documentary productions from place to place, that they are conveyed, if possible, by the same officer, in order that continuity of possession may be proved. As they are passed from one person to another, evidence should be preserved by means of written receipts, and if the same officer cannot act throughout, the various transmissions should be proved by witnesses who are named in the list in the Indictment.

Where a production consists of a sealed packet, the accused may present a Petition to the Court craving that the packet may be opened. If he does not do so, he cannot object to the packet having been closed against his inspection.¹

4. *Notices and Productions for Defence*

Special Defences.—There are certain special defences which the person accused is not permitted to state unless a plea of Special Defence is tendered and recorded at the first diet. On cause shown to the satisfaction of the Court, a special defence may be received at a later date, but in any case not less than *two clear days* before the second diet.² Macdonald enumerates the following special defences :—³

- (1) That at the time libelled the person accused was not at the place libelled, but at some other specified place (*alibi*) ;
- (2) That he was insane at the time when he committed the crime charged ;
- (3) That he was asleep at the time when he committed the crime charged ;⁴
- (4) That the crime was not committed by the person accused but by another person, named and designed ; and
- (5) That the crime was committed in self-defence.

It appears that special defences are not necessarily limited to those so defined. In one case,⁵ where a driver of a motor car was charged with culpable homicide, the following special defence was lodged on his behalf : “ The panel pleads not guilty in respect that by the incidence of temporary mental dissociation due to toxic exhaustive factors he was unaware of the presence of the deceased on the highway and of his injuries and death, and was incapable of appreciating his immediately previous and subsequent actions.”

It is obviously only fair that where a defence is put forward of such a technical character the prosecution should have notice. Notice in this case was given on the footing that the defence of “ abnormality ” was a special defence in terms of the statute. This

¹ Hume ii. 388 ; Alison ii. 594.

² 1887 Act, § 36.

³ P. 424. Forms are given in the Appendix, p. 313, *infra*.

⁴ *H.M. Adv. v. Fraser*, 1878, 4 Coup. 70.

⁵ *H.M. Adv. v. Ritchie*, 1926, J.C. 45.

course, it is conceived, should be followed in all cases where a defence of unusual character is to be maintained.

An objection by the prosecutor to the terms of a special defence is incompetent after a jury has been sworn and the defence read out.¹

Attack on the Character of the Complainer.—If the person accused intends to attack the character of the person whom he is charged with injuring,—if, for example, he is to prove immorality on the part of the woman in a charge of rape, or quarrelsome disposition on the part of the person assaulted,—he must give notice of his intention in the same way as a special defence.

Witnesses for the Defence.—The person accused, if he wishes to examine any witnesses, or to put in evidence any productions not included in the lists annexed to the Indictment, must give written notice of the names and designations of such witnesses, and of such productions, to the Procurator-Fiscal of the district of the second diet, when the case is to be tried in the Sheriff Court, or to the Crown Agent where the case is to be tried in the High Court of Justiciary.² He must do this at least three clear days before the day on which the jury is sworn to try the case against him. If he is unable to give this notice of three days, but can satisfy the Court before a jury is sworn of his inability, the Court may allow the witnesses to be examined, giving such remedy to the prosecutor, by adjournment or postponement of the trial, or otherwise, as shall seem just.³ Productions for the defence must be lodged, at the latest, the day before the trial.⁴

The accused is entitled to make use of the witnesses and productions on the Crown list without notice, although some agents think it desirable to add these to the accused's list by a general statement.

A copy, for the use of the Court, of every written notice required by the 36th section is lodged by the accused with the Sheriff Clerk of the district of the second diet, in a Sheriff Court case, and with the Clerk of Justiciary, in a case before the High Court of Justiciary at Edinburgh. He does this at or before the second diet.⁵

Objections to Crown Witnesses.—He must also give notice of his intention to object to any misnomer or misdescription of any person named in the Indictment, or of any witness in the list of witnesses. The objection must be stated before a jury has been sworn to try the case. If the accused intends to move on this ground for postponement of the trial, or for the exclusion of any witness, he must, at least four clear days before the second diet, give notice to the Procurator-Fiscal of the district of the second diet, in a Sheriff

¹ *H.M. Adv. v. Crumley*, 1871, 2 Coup. 27; 8 S.L.R. 493.

² 1887 Act, § 36.

³ *Ibid.*

⁴ Act of Adjournal, 1827. See p. 67, *supra*.

⁵ 1887 Act, § 36.

Court case, or to the Crown Agent, in a Justiciary case, of his inability to discover who such person named in the Indictment is, or to find such witness.¹ On receiving notice, the prosecutor must furnish him with such additional information as will enable him to ascertain who such person is, or to find such witness in time to precognosce him before the trial.²

Objections to Previous Convictions.—If the accused person intends to object to any previous conviction libelled as an aggravation, either as being invalid or inadmissible, or as not applying to him, he must give to the Procurator-Fiscal of the second diet, or to the Crown Agent, respectively, written notice of his intention at least five clear days before the second diet or any adjourned diet.³ When he proposes to plead guilty at the first diet, but objects to any conviction libelled, notice must be given not less than two clear days before such first diet.⁴

5. *Preparation of the Jury List*

The law relating to the constitution of a criminal jury is principally regulated by the Jurors (Scotland) Act, 1825.⁵ Women are now qualified to serve, in virtue of the Sex Disqualification (Removal) Act, 1919,⁶ and the Jurors (Enrolment of Women) (Scotland) Act, 1920.⁷ Rules as to the summoning of Jurors and the returning of Lists of Assize are laid down by an Act of Adjournal,⁸ which brings the then existing practice into line with these statutes.

Every person, who is not specially exempted, who is between the ages of twenty-one and sixty years, and who resides in any county in Scotland, is qualified to serve as a juror, provided that, at the time of the trial on which he is required to serve, (a) he has, and is seised, in his own right, or in right of his wife, of lands or tenements of an estate of inheritance, or for his or her life, within the county or shire, city or place, from whence the jury is to come, of the yearly value of £5 at least; or (b) is worth in goods, chattels, and personal estate the sum of £200 sterling at least.⁹

Many persons are exempted from service by the above-mentioned Act and subsequent statutes. The following are the principal classes :—

(1) Peers; (2) judges of the Supreme Court, Sheriffs, and magistrates of royal burghs; (3) ministers of religion; (4) parochial schoolmasters; (5) advocates, solicitors, and procurators in practice; (6) clerks and other officers of any Court of Justice; (7) jailers, and keepers of houses of correction; (8) professors in any university;

¹ 1887 Act, § 53.

² *Ibid.*

³ *Ibid.* § 66.

⁴ *Ibid.*

⁵ 6 Geo. IV. c. 22; Alison ii. 376 *et seq.*

⁶ 9 & 10 Geo. V. c. 71.

⁷ 10 & 11 Geo. V. c. 53.

⁸ 2nd February 1921.

⁹ 1825 Act, § 1.

(9) physicians and surgeons in practice ; (10) officers in the Army or Navy on full pay ; (11) officers of Customs and Excise ; (12) messengers-at-arms and other officers of the law ;¹ (13) commissioners of Income Tax ;² (14) police officers ;³ (15) lighthouse-keepers ;⁴ (16) soldiers of the Regular Army ;⁵ (17) dentists, if registered, and if they desire exemption ;⁶ (18) an officer or man of the Territorial Force.⁷

The names and designations of all persons qualified to serve as jurors are entered in a book made up by the Sheriff Clerk of the county, and called the *General Jury Book*. From this volume are taken the names of all persons qualified to serve as special jurors under the Jury Trials (Scotland) Act, 1815,⁸ namely, persons (a) paying cess in the county, city, town, or place from which the jury is to be taken, upon £100 of valued rent ; or (b) paying assessed taxes to the Crown on a house of the yearly rent of £30 sterling. These names are entered in a book called the *Special Jury Book*. Both volumes are open to inspection and examination by any person on payment of one shilling, and from them respectively are selected the common and special jurors to serve on a trial. The names are taken in rotation, and the date on which the juror has been returned to serve is marked on the Jury Book. Before the books have been completely gone through, the Sheriff Clerk has to prepare new ones.

Juries of Men only or of Women only.—The new legislation has brought with it a further complication. When the List of Assize is originally drawn up, it must be remembered that the case may be one which falls to be tried before a jury of only one sex, and as a result, sufficient jurors of each sex must be put on the list to permit of the impanelling of a full jury of either sex. This means that in the first instance the Clerk charged with preparation of the list must, therefore, include a sufficient number of both sexes to allow for this contingency.⁹

The procedure to be adopted when either the prosecutor or the person accused wishes a jury of one sex is laid down by the Act of Adjournal.¹⁰ The right to make such a request is given by the 1920 Act.¹¹ The application must be made at the first diet, immediately after the recording of a plea of not guilty, or where no plea is taken because of preliminary objections held by the Sheriff not to be frivolous, then immediately after such objections have been certified or otherwise disposed of by him.¹²

¹ § 2.

² 43 & 44 Vict. c. 19, § 40.

³ 20 & 21 Vict. c. 72, § 18.

⁴ 32 & 33 Vict. c. 36.

⁵ 44 & 45 Vict. c. 58, § 147.

⁶ 41 & 42 Vict. c. 33, § 30.

⁷ 7 Edw. VII. c. 9, § 23.

⁸ 55 Geo. III. c. 42.

⁹ Act of Adjournal, 2nd February 1921, A. (vi.).

¹⁰ *Ibid.* B.

¹¹ § 1 (b).

¹² Act of Adjournal, 1921, B. II.

If the second diet is appointed to be held in the Sheriff Court, and the judge presiding at the first diet is a Sheriff having jurisdiction to try the case, he may, if so advised, forthwith deal with the application in the manner in which as is later provided in the Act of Adjournal it may be dealt with by the judge of the Court of the second diet, or he may at his own instance make an order as to the composition of the jury in accordance with these later provisions, in which case his decision is final ; or he may reserve consideration of the question.¹

In all cases in which an application is made but not dealt with by the presiding judge, the matter must, on the third lawful day after the date of the first diet,² be submitted to a Lord Commissioner of Justiciary, or, where the second diet is in a Sheriff Court, to a Sheriff having jurisdiction to try the case.³

The Commissioner of Justiciary, or the Sheriff, as the case may be, deals with the matter summarily, granting or refusing the application, and his decision is final. Provision is made for intimation to parties and for enquiry and hearing.⁴

None of these provisions, however, prevents the judge who presides over a trial from making an order that the jury shall be composed of one sex at any stage prior to the impanelling of the jury, provided, of course, that no application has already been made in terms of the Act of Adjournal,⁵ and also provided that there are a sufficient number of men or women (as the case may be) on the Assize List and present and available to form a jury of the composition contemplated.

Selection of Jurors from the Panel.—The Act of Adjournal provides⁶ that in any case where the jury is to be of one sex, there shall be placed in the boxes or glasses used for containing the slips, the slips containing the names of all the jurors who have been summoned ; but in balloting, persons whose names shall be drawn who are not of the required sex shall be passed over ; but the jury shall be composed of the fifteen persons of the required sex whose names shall be first drawn and who shall not be successfully challenged in the usual proportion of common and special juries. In the ordinary case, however, the ballot is carried through in the usual fashion without distinguishing between men and women.⁷

Women in Certain Circumstances entitled to Exemption.—Any woman summoned to serve on a jury shall be entitled to apply to be exempted from service on account of pregnancy or other feminine

¹ Act of Adjournal, 1921. B. III.

² Special provision is made in the Act of Adjournal to meet difficulties of communication in so short a period. B. IV. (ii.) (iii.).

³ *Ibid.* B. IV.

⁴ *Ibid.* B. IV. (i.).

⁵ *Ibid.* B. V.

⁶ *Ibid.* D. VII. (i.).

⁷ *Ibid.* D. VII. (ii.).

condition or ailment. The citation served on a woman summoned as a juror must have endorsed on it a notice in the form prescribed by the Act of Adjournal informing her of her right to exemption and the steps which she must take to obtain it.¹

Preparation of List of Assize.—It was formerly necessary to attach to the Indictment a full list of the names and designations of the persons who were to form the jury. This is now unnecessary. On service of an Indictment, a list of jurors is prepared from the General and Special Jury Books under the directions of the Clerk of Justiciary or the Sheriff Clerk of the district of the second diet, according as the case is one in the High Court or in the Sheriff Court. This list contains the names of both special and common jurors, in the proportion of one special to two common. The number of jurors on the list varies with circumstances, and the matter is dealt with by the Act of Adjournal, 2nd February 1921. The list must contain as nearly as may be an equal number of men and women in each category of special and common jurors.² The men and women returned must be grouped separately on the list, either by their names being placed in different columns or in some other convenient manner; special and common jurors must also be discriminated.³ A husband and wife shall not be returned in any case on the same List of Assize.⁴ The list itself is headed in this form: "List of Assize for the Sitting of the High Court of Justiciary (*or* the Sheriff Court of the Lothians and Peebles) at Edinburgh on the 13th of April 1908." It is kept in the office of the Sheriff Clerk of the second diet. The accused is entitled to have a copy supplied to him on application, free of charge.⁵

It is not necessary to summon all the jurors contained in this list. It is competent to summon such jurors only, commencing from the top of the lists of special and common jurors respectively, as may be necessary to ensure a sufficient number for the trial of the cases which remain for trial at the date of the citation of jurors. The number is fixed by the Sheriff Clerk of the district of the second diet, or by the Clerk of Justiciary, as the case may be. Where some of the jurors are not summoned, their names are placed upon the next list issued, until they have attended to serve.⁶

As already pointed out, the list must, in the first instance, contain a large number of names to meet the contingency of a jury of one sex being required. Once an order to that effect has been pronounced, and it appears that all the cases appointed for trial are to be tried by jurors of one and the same sex, the names of jurors of the other

¹ Act of Adjournal, 1921. E. VIII., IX., X., and Schedule.

² Act of Adjournal, 2nd February 1921, A. (iii.).

³ *Ibid.* A. (V.).

⁴ *Ibid.* A. (VI.).

⁵ 1887 Act, § 38.

⁶ *Ibid.* § 39.

sex may be struck out, and they need not be cited.¹ On the other hand, if no application is made, the Clerk of Court may proceed to reduce the list by striking out an equal number of each sex, beginning from the bottom of the list for each district. Only the remainder need be cited. If, however, from the terms of any special defence lodged, it shall appear to the Clerk of Court that the question of having a jury of one sex may arise, he shall take the instructions of a judge competent to try the case before reducing the list.²

It sometimes happens, in consequence of death, illness, old age, or other causes, that a number of persons named in the Jury List are not available for the trial. There is then danger that, after allowing for the challenges, there may not be a sufficient number of jurors present to constitute a jury. There is as yet no satisfactory provision for dealing with this contingency, except by placing on the original Jury List the names of more jurors than are likely to be needed. Some Sheriff Clerks, in a case of this kind, cite additional jurors and add their names to the list. This is an improper practice, and, if objected to before the jury is sworn, might necessitate the desertion of the diet.³

The jurors are cited in virtue of the warrant for citation already described, and in conformity with § 23 of the 1887 Act. They are cited by registered letters.

It is necessary to keep in mind that when the High Court of Justiciary holds a Court in a town which is not one of the usual circuit towns, the jury is summoned from the general Jury Roll of the county in which such town is situated. Where the High Court holds sittings in towns which have hitherto been called circuit towns, the jury is summoned from the several counties which compose the circuit.⁴

Fines for Failure to attend.—Persons failing to attend when cited as jurors are liable to fines in terms of certain ancient statutes.⁵ It is, however, competent to make application for remission of such fines to a Lord Commissioner of Justiciary who considers the excuse offered for non-attendance, and may remit the fine if satisfied of the sufficiency of the excuse.⁶

6. *Prevention of Undue Delay in Trial.*

An Act of William III., passed in 1701 and intituled “An Act for preventing Wrongous Imprisonment and against Undue Delay in Trials,” made a very cumbrous provision for an accused person accelerating his trial. These provisions are repealed.⁷ Any prisoner who is now in prison on a commitment until liberated in due course

¹ Act of Adjournal cit., C. VI. (i.).

² 1887 Act, § 39, Act of Adjournal, 1921, C. VI. (ii.).

³ *M'Arthur v. H.M. Advocate*, 1902, 10 S.L.T. 310.

⁴ 1887 Act, § 47. See p. 7, *supra*.

⁵ 1587, c. 54, § 10, and 1593, c. 13.

⁶ Act of Adjournal, 19th March 1925.

⁷ 1887 Act, § 43.

of law, and who has not been served with an Indictment within sixty days of commitment, is entitled to give notice to the Lord Advocate, through the Crown Agent in Edinburgh, that if he is not served with an Indictment within fourteen days of such notice the prosecutor will be called on to show cause before the High Court of Justiciary why the accused should not be released from prison. If no Indictment is served within such fourteen days, and if the accused presents a note to the Court setting forth that he has given notice, and that no Indictment has been served, the Court appoints the prosecutor forthwith to show cause why the accused should not be released. If cause is not shown to the satisfaction of the Court, warrant is granted for the release of the accused at the expiry of three days from the issuing of the order, unless an Indictment has been served upon him within that time. If the accused is liberated, it is competent for the prosecutor to raise an Indictment against him and to obtain from a judge of the jurisdiction of the second diet, or a judge of the High Court of Justiciary, a warrant authorising the apprehension of the accused and his re-commitment to prison to await his trial. In the event of the trial on the new Indictment not taking place at the second diet or at any adjourned diet, the accused may present a note to the High Court of Justiciary stating the facts. The Court, after hearing parties and considering the whole circumstances of the case, may in its discretion (1) order the immediate release of the prisoner, or (2) grant warrant ordering him to be released on a day named in the warrant, unless he shall on or before such day be remitted to the knowledge of an assize on Indictment, or (3) may decline to pronounce any order.¹

Where the accused has been incarcerated for *eighty days*, and an Indictment is served upon him, and he is detained in custody after the expiry of such eighty days, then, unless he is brought to trial and the trial concluded within *one hundred and ten days* of the date of his committal until liberated in due course of law, he is forthwith set at liberty, and declared for ever free from all question or process for the crime with which he was charged.²

Where the accused has been liberated from prison after committal until liberated in due course of law, he must not be detained in prison more than one hundred and ten days in all; but unless his trial is brought to a conclusion before the hundred and tenth day of confinement in prison subsequent to committal has expired, he is forthwith set at liberty, but in any case brought before the High Court of Justiciary under these provisions it may be shown to the satisfaction of the Court that the trial of the person accused ought to be suffered to proceed after the lapse of one hundred and ten days, in respect that the delay is owing to the illness of the accused, the

¹ 1887 Act, § 43.

² *Ibid.*

absence or illness of a necessary witness, the illness of a judge or juror, or any other sufficient cause, for which the prosecutor is not responsible. If this is done, the Court may order the accused to be kept in custody with a view to trial for such further period or periods as may seem just.¹ The power so conferred on the Court is not confined to cases in which an application for extension is made before the expiry of the hundred and ten days, but may be exercised even where the accused has already been incarcerated² for more than the statutory period.

Illustrations.—The accused was committed for trial until liberated in due course of law on 8th October 1891, on charges of murder and assault. Crown Counsel decided that he should be tried for culpable homicide at the first sitting of the High Court in Dundee. That sitting was on 19th December fixed for 29th January following. By that date the accused would have been incarcerated for eighty days, served with an Indictment, detained in custody after the expiry of such eighty days, and the period of one hundred and ten days within which he ought to have been brought to trial would have expired. The Crown presented a petition to the Court praying for his detention in prison for a period of eight days from the termination of the hundred and tenth day—26th January; but this the Court refused, holding that the Crown might have made application for a special diet for the disposal of the case, and that the prosecutor was responsible for the delay.³

A prisoner was committed till liberated in due course of law on 9th December 1924, upon a charge of murder. He was brought to trial upon 16th March 1925, when he was found to be unfit to plead owing to insanity, and was ordered by the Court to be detained during His Majesty's pleasure, the diet being deserted *pro loco et tempore*. On 22nd October 1925 the accused was liberated from the asylum in which he had been detained, and was re-arrested on the same day. On 27th October he was again committed; a fresh Indictment was served upon him on 19th November; and he was brought to trial on 7th December 1925. At the trial, a motion was made in bar of trial, in respect that even if the period of his detention in the asylum was left out of account, he had already been detained in prison for more than one hundred and ten days, and was therefore entitled to be released forthwith. The Court held that assuming (but not deciding) that the hundred and ten days fell to be reckoned from the date of the first and not of the second commitment, and accordingly that the panel had already been detained in prison beyond the statutory period, it was entitled under § 43 of the 1887 Act to order him to be detained in custody, with a view to trial for

¹ 1887 Act, § 43.

³ *H.M. Adv. v. Macaulay*, 1891, 3

² *H.M. Adv. v. Bickerstaff*, 1926, White 131.
J.C. 65.

such further period as might seem just. The Court also held that as the delay in prosecuting to verdict had been due to the mental illness of the accused, and not to any cause for which the prosecutor was responsible, the case was one for the exercise by the Court of its discretionary power.¹

7. *Dying Declarations and Depositions*

When there is danger of material evidence being lost through the death of a witness, either for the prosecution or the defence, previous to trial, it is necessary to take steps for its preservation. This is done by means of dying declarations and dying depositions.² The distinction between the two consists in the latter being upon oath and the former not upon oath. A dying declaration may be preserved and proved by oral evidence, just as may any statements of a deceased person, but while such verbal statements may be admissible much will depend on the facts of each case and the circumstances under which the statements spoken to were made.³ In this connexion we shall here consider only *written* statements.

If it becomes apparent that an important witness is dying, and there is not time to arrange for his formal deposition, his evidence may be taken down as a declaration in writing by any credible person. The statement concludes with an assertion that it is all truth. If possible, the declaration should be signed by the dying witness. In any case, it must be signed by the person who takes it down and two witnesses present. It is particularly desirable that one of these witnesses should be the medical man in attendance upon the witness. The doctor should be prepared to state that the mind of the dying person was sufficiently clear to enable him to give a reliable statement of fact.

The conditions which justify taking a dying deposition are these : (1) that the person would be a competent witness in a criminal trial ; (2) that he is a material witness ; (3) that his life is in danger ; (4) that his mind is sufficiently clear to enable him to give reliable evidence ; and (5) that he is capable of doing so without danger to his life.

The deposition is taken by the Sheriff-Substitute who has jurisdiction in the place where it is emitted ; but a Justice of Peace, or Burgh Magistrate having jurisdiction, may take it in an emergency. If the witness is in imminent danger, the magistrate must take the deposition as speedily as possible ; but if there is time, the magistrate should first satisfy himself of the necessity for taking a deposition, and of the fitness, mentally and physically, of the witness to emit it.

The deposition is usually taken upon a verbal application to the

¹ *H.M. Adv. v. Bickerstaff*, 1926, J.C. 65.

³ Lewis, *Law of Evidence in Scotland*,

² Hume ii. 407 ; Alison ii. 511 ; 327.

Dickson, §§ 1754-6. See Appendix, p. 314, *infra*, for form.

magistrate. The doctor in charge of the case sees the person alone and prepares him for the appearance of the magistrate. If there is time, it is desirable that he should prepare a certificate on soul and conscience that the person is believed to be dying, and is mentally and physically fit to depone. The doctor is present during the examination, both as a witness and to guard against harm to his patient. It is desirable to have as few persons as possible in the room. Two witnesses are necessary, but the magistrate and doctor will suffice. It is advisable to have the Sheriff Clerk or one of his deposes in attendance to write the deposition, but he should, if possible, be placed out of sight of the witness.

The magistrate puts the witness on oath and takes down his name, occupation, usual residence, and age, and what he knows of the facts, confining the questions to matters as to which the witness's evidence is essential; and puts any further question suggested by the Procurator-Fiscal, or, if the evidence is taken for the defence, by the agent of the accused. A previous precognition may be incorporated by reference; but this is not a commendable practice.¹ It is not necessary that the deponent should believe himself to be dying, to even be warned that his life is in danger. At the conclusion it is usual to ask the witness whether he bears any ill-will towards the accused. The magistrate reads over to the witness what has been written, and asks if what he has said is all truth, as he shall answer to God. The witness signs each page, if able; if unable, the fact is stated. The deposition is then signed by the magistrate and witnesses.

The dying deposition or declaration is retained by the Procurator-Fiscal, or, if the deposition has been taken for the defence, by the agent for the accused, and is entered upon the list of productions for prosecution or defence, and produced at the trial. It is not used unless the deponent dies. The names of the magistrate and the witnesses to the deposition are included in the witness list for prosecution or defence. At the trial these prove the taking of the deposition, and it is then read to the jury and received as the evidence of the deceased witness.

There is not much authority on this subject. The principal authorities are undernoted.²

8. *Witness in Prison*

When a witness is in prison, it is necessary to present to the Sheriff a Petition to secure his attendance for precognition or trial

¹ *Petersen*, 1874, 2 Coup. 557.

M'Intosh, 1838, 2 Swin. 103; *Brodie*,

² *Hume* ii. 407; *Alison* ii. 511; *Dickson*, §§ 1754-56; *Reid*, 1831, *Bell's* Notes, 291; *Bell*, 1835, 13 *Shaw*, 1179;

1846, *Ark.* 45; *Stewart*, 1855, 2 *Irv.* 166; *Ward*, 1869, 1 Coup. 186; *Petersen*, 1874, 2 Coup. 557.

as may be necessary. This Petition is in the form furnished in the Appendix.¹ If it is desired to have a prisoner dressed in his ordinary clothing for the purpose of identification, this will be craved in the Petition ; otherwise he will be sent in prison dress.

9. *Witness Absconding*

If a witness has absconded, either party may apply to the Court by Petition for warrant to apprehend him.² This Petition is supported by a statement on oath that the witness has absconded to avoid giving evidence. Warrant is granted for the apprehension of the witness and his commitment to prison until the date of trial, unless he finds sufficient caution for his compearance at the trial.³ Forms are furnished in the Appendix.⁴

10. *Witnesses in England or Ireland*

The citation of witnesses in England or Ireland is regulated by 45 Geo. III. c. 92, §§ 3 and 4. Service is usually made through the police, and a reasonable sum of money must be tendered to the witness to defray his expenses.

¹ P. 314, *infra*.

² Alison ii. 398.

³ Hume ii. 375.

⁴ P. 315, *infra*.

CHAPTER V

ACCELERATED TRIAL UNDER § 31 OF THE 1887 ACT

A PERSON accused is entitled, so soon as he has been committed to prison till liberated in due course of law, to give written notice, through his own procurator or law agent, to the Crown Agent that he desires to have his case at once disposed of, and intends to plead guilty. This notice is given by a letter addressed to the Crown Agent and signed by the procurator of the accused.¹

Procedure.—If the plea is accepted, an Indictment is prepared without any list of witnesses or productions, other than productions to prove previous convictions. A copy of this Indictment, with a notice in the form of sched. L., is served upon the accused person. No witness to the service is required. The accused is cited to a diet not less than four clear days after such notice.

The diet is called in the Sheriff Court at which he would have been cited to a first diet. At such diet, if any plea of guilty is tendered which is accepted by the Procurator-Fiscal, the Sheriff deals with the case as if the person had pled guilty at a first diet under the ordinary procedure. If the case is one suitable for punishment in the Sheriff Court, he forthwith pronounces sentence.

Remit to the High Court.—If the case is such as can only be tried in the High Court of Justiciary, or is of such an aggravated nature that the Sheriff holds that the question of punishment should be disposed of by that Court, he remits the accused to the High Court for sentence. The interlocutor is written on the principal or record copy of the Indictment, and is in the form of sched. M.² The procedure laid down by the section must be strictly complied with. Where the plea of guilty was signed by the accused but not by the Sheriff, the panel on the case coming before the High Court was dismissed from the bar, the diet being deserted *simpliciter*.³ In another case where the panel's plea and the remit were written on a copy of the Indictment instead of on the principal, the remit was held invalid and the panel discharged.⁴ The authors expressed the opinion that the difficulties arising in these two cases might have been obviated if the case had not been called *or* the diet had been deserted *pro loco et tempore*. This opinion was based on the case of

¹ 1887 Act, § 31; p. 315, *infra*.

² P. 316, *infra*.

³ *H.M. Adv. v. Galloway*, 1894, 1 S.L.T., 604; 1 Adam 375.

⁴ *H.M. Adv. v. M'Donald*, 1896, 3 S.L.T., 317.

Pattison,¹ in which it was pointed out that § 31 did not abrogate the rights of the Crown at common law prior to the passing of the 1887 Act.

Illustration.—A panel was apprehended, examined, and committed on a charge of embezzling £1,600. His agent thereafter gave a letter under § 31 offering to plead to the embezzlement of £500, part of said £1,600, the specific items amounting to £500 not being named. He was thereafter served with an Indictment charging him with embezzling certain specified sums amounting to £501. 1s. 7d., to which he pled guilty before the Sheriff-Substitute, and was remitted to the High Court for sentence. He was not brought before the High Court on that Indictment, Crown Counsel entertaining doubts of the relevancy, and he was subsequently liberated, and thereafter immediately apprehended, examined, and committed for trial on a fresh charge of embezzlement embracing items different from those in the Indictment referred to. He presented a suspension of these warrants, maintaining that it was incompetent for the Court to proceed further after liberating him on the charge to which he had pled guilty and been remitted for sentence. Held, that the procedure adopted by the Crown was competent, and that § 31 did not affect the rights of the Crown at common law prior to the passing of the 1887 Act.

Lord Moncreiff said: "According to our law and practice, the prosecutor is not bound to accept the plea of guilty to the whole charge, and is entitled, notwithstanding the plea, to proceed to trial. Further, in this case he might, if he had chosen to do so, have indicted the complainer for the whole £1,600, and left the complainer to tender such plea as he thought fit. . . . The case must be considered just as if, after the plea was recorded, the Sheriff had been prepared himself to pronounce sentence; but the respondent, instead of moving for sentence, had moved to desert the diet *pro loco et tempore*. . . . Before the passing of the Act of 1887, it was quite settled that His Majesty's Advocate was entitled, even after a case had been called in Court, to serve a new Indictment at his own hand upon the panel during an adjournment, or (in the Sheriff Court) between the first and second diets; subject always to this, that if the second Indictment related to the same charges as the first he might be bound, before proceeding to trial with the second Indictment, to judicially abandon the first."²

The remit is a sufficient warrant to bring the accused, without any further notice, before the High Court of Justiciary for sentence, at any sitting, at any place that may be convenient, as the Lord Advocate may order. The original warrant of commitment of such person till liberated in due course of law remains in force until he is brought before the High Court for sentence.³

¹ *Pattison v. Stevenson*, 1903, 5 F. (J.) 43; 4 Adam 124.

² *Pattison v. Stevenson*, *supra*.

³ 1887 Act, § 31.

Withdrawal of Plea.—If the person accused, when brought before the Sheriff as above mentioned, pleads not guilty to the charge, or pleads guilty to part thereof, and the Procurator-Fiscal declines to accept such restricted plea, the diet is deserted *pro loco et tempore*. Thereafter the case proceeds as if no letter had been written.¹

If the accused person pleads guilty, and has been remitted to the High Court for sentence, he cannot withdraw his plea unless he can show very special circumstances, which satisfy the Court that his plea was tendered in error.

Illustrations.—A panel who had given notice of his intention to plead under § 31, who had at the diet before the Sheriff pleaded guilty under that section, and who had been remitted to the High Court for sentence, desired at the sitting of that Court to withdraw his plea, founding on § 41 of the Act. Held that § 41 did not apply to procedure under § 31, and application refused. Lord M'Laren, referring to the procedure under § 31, said: "This kind of procedure can only be instituted by consent of the prisoner, and in pursuance of his declared intention to plead guilty. The form prescribed by the statute is one which does not contain any provision for going to trial under the charge; but what makes the matter clear beyond doubt is that in the case of the prisoner changing his mind when brought before the Sheriff, then 'the diet shall be deserted *pro loco et tempore*, and thereafter the procedure against the person accused may be according to the other provisions of this Act.' If it had been in the contemplation of the Legislature that such a thing could take place as the withdrawal of the plea of guilty after the accused had been remitted to the High Court for sentence, there would have been some provision made for the disposal of the case in that event, but there is none."²

In the case already mentioned, *Pattison v. Stevenson*,³ Lord Moncreiff observed: "It is right to notice the case of *Lord Advocate v. Lyon* (December 22, 1887, 1 White, 538), which was pressed upon us. If the decision in that case merely amounts to this, that a person who pleads guilty before the Sheriff, under § 31, will not be allowed to withdraw his plea when brought before the High Court of Justiciary except upon cause shown, I should see no reason to doubt its soundness. But if it means that a plea given under § 31 can in no circumstances be recalled, I am not prepared to follow the decision. The criminal law of Scotland, in so far as not inconsistent with the Act of 1887, is still in full force (§ 74); and I see nothing inconsistent with giving effect to § 31 in what the prosecutor proposes to do in the present case."

A panel pled guilty to a charge of incest under § 31, and was

¹ 1887 Act, § 31.

² *H.M. Adv. v. Lyon*, 1887, 15 R. (J.) 66; 1 White 538.

³ *Supra*.

remitted to the High Court for sentence. At that diet it was pointed out by his counsel that he had failed prior to that plea being tendered to inform his agent that his step-daughter, with whom the crime was alleged to have been committed, was illegitimate, and the plea had been given in ignorance of the signification of that fact. Counsel asked that he should be allowed to withdraw his plea. The Advocate-Depute admitted the correctness of the facts as stated for the accused, and lodged a minute withdrawing the libel. The Court then allowed the accused to withdraw his plea, and the diet was deserted *simpliciter* and the panel dismissed from the bar.¹

A panel pled guilty under § 31 to a contravention of 10 Geo. IV. c. 38, § 3 (vitriol throwing), and was remitted to the High Court for sentence. At that diet his counsel stated that the plea had been tendered in ignorance that the charge inferred the capital penalty, and asked leave to withdraw the plea. The Advocate-Depute stated that he desired to restrict the libel to the common law charge contained therein. The Court allowed this to be done, and in the course of his opinion the Lord Justice-Clerk (Macdonald), referring to the decisions in previous cases that where a panel had pleaded under the section it was not in his right to withdraw that plea at the second diet, said: "As a general proposition I hold that to be quite sound. But I am of opinion that where it appears that something has been done in error, and particularly where the prosecutor is satisfied that it is so, and therefore does not object, the Court is entitled under § 41 to allow a plea to be withdrawn even although that plea was tendered under § 31." The libel having been restricted to the common law charge, the panel pleading guilty to this, was sentenced to five years' penal servitude.²

Two persons who were charged with theft by housebreaking and with being habitual criminals within the meaning of the Prevention of Crime Act, 1908, § 10, having, under § 31 of the 1887 Act, and § 17 (3) of the Prevention of Crime Act, 1908, pleaded guilty to the charge of theft, and admitted that they were habitual criminals, were remitted by the Sheriff for sentence to the High Court. Both were sentenced by the presiding judge to terms of penal servitude and preventive detention, one having asked and been refused leave to withdraw his admission that he was a habitual criminal. Both accused then appealed to the Court of Appeal and asked leave to withdraw their pleas to the charge of habitual criminality, alleging that in pleading guilty they believed that they were merely admitting that the list of previous convictions annexed to the Indictment was correct, and did not understand the nature of the charge and the penal consequences which it involved. The Court refused the appeals on the ground that the procedure had been regular throughout and

¹ *H.M. Adv. v. Black*, 1894, 1 S.L.T. 436; 1 Adam 312.

² *H.M. Adv. v. Robertson*, 1899, 1 F. (J.) 74; 3 Adam 1.

the accused had been advised by law agents. It was observed that very strong and very special grounds were required to justify the Court's interference, for example, if it could be shown that a prisoner had given an admission while labouring under some substantial error or misconception, or in circumstances which tended to prejudice his case.¹

¹ *Paul v. H.M. Adv.*, 1914, S.C. (J.) 69; 7 Adam 343.

CHAPTER VI

THE FIRST OR PLEADING DIET

Sheriff Court Case.¹—We shall first explain the procedure where the trial is to take place before the Sheriff and a jury. The first or pleading diet, as was already stated, may be called in a different Court, and even in a different jurisdiction, from that in which the second diet is called. In that event the Procurator-Fiscal of the district in which the first diet is called acts as representing His Majesty's Advocate. It is competent, however, for an Advocate-Depute, or the Procurator-Fiscal of the district of the second diet, to appear for the purpose of prosecuting. The Sheriff of the first diet, where the Sheriff presiding is not the Sheriff of the Court of the second diet, has all the powers legally exercised by a Sheriff at a first diet.²

Presence of Accused.—Whoever conducts the prosecution must arrange for the person accused being brought from prison, if he is in custody. The procedure begins usually by the Sheriff Clerk saying: "Call the diet His Majesty's Advocate against A. B." The diet is peremptory, and, while it cannot be called, even of consent, *before* the date fixed, the proceedings fall if it is not called *on* that date. This happens when neither prosecutor nor accused appears.

Presence of Prosecutor.—The prosecutor must be personally in Court. A Procurator-Fiscal duly commissioned may act in the absence of the Procurator-Fiscal who instituted the prosecution.³ In an emergency the Court may appoint a person to act for the Procurator-Fiscal *ad interim*.⁴

Illustration.—A prisoner pleaded guilty in the Police Court to a charge of theft and was sentenced. The burgh prosecutor was not present, nor represented by deputy. The conviction was quashed. Lord Justice-Clerk Macdonald said: "It is a well-established rule of criminal law that no proceedings can take place in the absence of the prosecutor or of the accused. No doubt the Court has inherent power, in the event of the death or disability of the prosecutor, to appoint a Procurator-Fiscal, *pro hac vice*, but such an official must be formally appointed, and must, I think, take an oath or

¹ See p. 316, *infra*.

³ *Macrae v. Cooper*, 1882, 9 R. (J.) 11;

⁴ *Coup*. 561

² 1887 Act, § 28.

⁴ Macdonald 286.

declaration *de fidei*; but at least he must appear as having an official appointment.”¹

Failure of Accused to appear when liberated on Bail.—If the accused person has been liberated on bail and fails to appear the Sheriff cannot pronounce sentence of fugitation.² That process is restricted to the High Court of Justiciary. The proper course in the Sheriff Court is for the Court, on proof of service, to declare the bail bond, or the caution deposited for accused's appearance, to be forfeited, and a new warrant may be granted for his apprehension and committal to prison till liberated in due course of law. Service is proved by production of an execution in the form of sched. C.³ If the accused person is at liberty without having found bail (which is a rare case), a warrant for his apprehension and committal to prison may be granted, or in place of this the Court may impose a fine.⁴ The cautioner in the bail bond may plead objections to the citation as a reason why the bail should not be forfeited. It is competent to desert the diet *pro loco et tempore* and forfeit the bail bond;⁵ but as there seems to be an anomaly in deserting a diet which has never been constituted by the appearance of the accused person, the preferable course is that which we have indicated.

Right of Accused to be represented by a Law Agent.—On the accused person being placed in the dock, he is entitled, if he has not a law agent and wishes the assistance of one, to have a law agent assigned to him by the Court.⁶ In all cases, a law agent who is entitled to conduct proceedings in the Courts of the district of the second diet is entitled to appear at the first diet and to conduct the defence, although he may not be entitled to conduct other law business in the locality of the first diet.⁷

If the accused person does not understand English, an interpreter is sworn to interpret the proceedings to him. The Indictment is then read over to the accused person.

Objections to Validity of Citation.—Before the accused pleads either guilty or not guilty, he must state any objections to the validity of the citation against him on the ground of any discrepancy between the record copy of the Indictment and the copy served on him, or on account of any error or deficiency in the service copy or in the notice of citation. Such objections are not competent at a later diet. No such discrepancy, error, or deficiency entitles the accused to object to plead to the Indictment unless the Sheriff

¹ *Walker v. Emslie*, 1899, 2 F. (J.) 18;

³ Adam 102.

² Hume ii. 69; Alison ii. 350.

⁵ *Vide* Appendix.

⁴ Hume ii. 70.

⁵ *Morrison*, 1854, 1 Irv. 599.

⁶ 1587, c. 91; Hume ii. 283.

⁷ 1887 Act, § 30.

is satisfied that the same tended substantially to mislead and prejudice him.¹

Objections to Competency and Relevancy.—Any objections to the competency of the proceedings, or to the relevancy of the Indictment, or of the statements made in it, must be made at the first diet. It is only in exceptional cases that this rule will be departed from. There are two types of cases in which objections will be considered at a later stage. First, where the Court is of opinion that gross injustice would be done by refusing to hear the objection; and second, where the objection is such as to go to the very root of the charge and to make it a fundamental nullity.

Illustrations.—Objections to charge of embezzlement that specific sums not set forth, but only a balance arising on a number of transactions, repelled. It was observed that under §§ 29 and 33 of 1887 Act objections to relevancy must be stated at first diet, but that the Court was entitled to interfere should it appear that gross injustice would be done by refusing to hear an objection to relevancy at the second diet which had not been stated at the first.²

Objections to relevancy stated for first time in a suspension repelled. Lord Moncreiff said: "Such an objection ought to have been taken in the Court below. It would require an extreme case for us to sustain an objection of this kind when it was not so taken—a case in which the Indictment is practically a nullity, no crime being charged."³

A person who had been convicted in Dundee on an Indictment charging him with falsehood, fraud, and wilful imposition, brought a suspension on the ground that he had been arrested in England and brought to Scotland without a warrant. He did not state this objection before the case went to trial. Held that the objection came too late.⁴

When objections are taken it is not necessary to enter on the record copy of the Indictment, or in the record, any minute setting forth how such objections were disposed of, except that such objections were sustained or repelled. The minute is signed by the Clerk of Court.⁵

Character of such Objections.—Prior to 1887, objections to the relevancy of the libel formed an almost invariable step in a criminal trial. Since the passing of the Criminal Procedure Act such objections have become rare in Solemn Jurisdiction.⁶ They are more common in Summary Jurisdiction, chiefly on account of the varied

¹ 1887 Act, § 33.

⁴ *Lloyd v. H.M. Adv.*, 1899, 1 F. (J.)

² *H.M. Adv. v. Bell*, 1892; 3 White 313; 2 Adam 637.

⁵ 1887 Act, § 32.

³ *Sangster v. H.M. Adv.*, 2 Adam 182.

⁶ P. 49, *supra*.

character of the statutes under which complaints may be brought. It should be kept in mind that, particularly in Solemn Jurisdiction, preliminary objections rarely benefit the accused person, and often cause him needless delay and expense.

Distinction between Competency and Relevancy.—It is necessary to distinguish carefully between *objections to competency* and *objections to relevancy*. The distinction is often ignored in practice. The two classes of objections may be distinguished by the general observation that an objection to competency implies that the trial of the accused person before a certain Court, or at the instance of a certain prosecutor, or upon a certain charge, is not competent; an objection to relevancy implies that the trial of the accused person on a certain Indictment is contrary to law. If successful, the former generally puts an end to the whole proceedings; the latter puts an end to the Indictment served. The one is usually fatal; the other in most cases can be cured by the service of a new Indictment or complaint.

1. Objections to Competency.—An objection to competency may be taken on any ground which strikes at the right to prosecute. The principal grounds are these :—

- (a) That the Court has not jurisdiction to try the crime charged.
This may arise either in respect that the crime has been committed outside the territory of the Court; or that its gravity exceeds the powers of trial committed to the Court; or that the judge has a material interest in the accused person, or in the question at issue.
- (b) That the prosecutor has no title or interest to prosecute.
This may arise in the case of a public prosecutor, in respect that his commission does not authorise him to prosecute; in the case of a private prosecutor, in respect that he is neither aggrieved nor injured by the crime charged.
- (c) That the charge involves a question of civil right. This is a very complicated question, which arises almost exclusively in summary procedure. It is always a matter of circumstances, and each case has to be judged by itself.
- (d) That there has been such irregularity in the prior proceedings as would vitiate any conviction obtainable.¹
- (e) That proceedings in a statutory offence have not been taken within the time limited by the statute for prosecution.
- (f) In summary procedure, that the crime charged cannot be tried summarily.

2. Objections to Relevancy.—A distinction must be drawn at the outset between the relevancy of a criminal libel and the relevancy

¹ Cf. *Lloyd v. H.M. Adv.*, 1899, 1 F. (J.) 31; 2 Adam 637 (accused arrested in England and brought to Scotland without a warrant).

of a statement contained in a criminal libel. The first raises the question whether the libel as a whole is sufficient in law to justify the Court in calling upon the person accused to plead to the charge made in it; the second raises the question whether a particular allegation in the libel is so distinct and specific that, if proved, it would infer the point sought to be deduced from it, according to the Latin maxim: *Frustra probatur quod probatum non relevat*.

The grounds upon which the relevancy of the libel may be objected to are very numerous. The following are some of the principal:—

- (a) That the libel (whether Indictment or complaint) is not in correct form.
- (b) That it appears on the face of the libel that an essential preliminary step has been omitted—such as an oath of verity, or the concurrence of the public prosecutor, in cases where either of these is required.
- (c) That the libel contains a material error in the name or designation of the prosecutor or the person accused, or in setting forth their respective connexion with the case.
- (d) That the libel does not set forth facts which infer either a crime at common law or a contravention of an Act of Parliament applicable to Scotland.
- (e) That the libel contains a statement of the charge which is defective or ambiguous in the specification of the time, place, or mode of committing the crime charged.
- (f) That the libel in a statutory offence does not mention, or mentions inaccurately, the Act of Parliament and the particular section contravened.
- (g) That the libel has not been signed, or is signed by the wrong person.

The question whether a particular statement in the libel is relevant or not depends upon the circumstances of each case. It would be useless to attempt to set down here a list of such objections. The principles of relevancy of averment are not in any way different in criminal procedure from what they are in any other form of pleading.

Amendment of Indictment.—Very wide powers of amendment are now conferred by statute. These will fall to be considered when explaining the procedure at trial.¹ If, therefore, an objection to relevancy is sustained by the Court, the proper course is to amend the Indictment, with or without an adjournment, if such amendment will cure the defect. Should this not be possible, the prosecutor will move the Court for permission to desert the diet *pro loco et tempore*. The motion is usually granted. A new Indictment can then be prepared and proceedings will be begun *de novo*.

¹ P. 96, *infra*.

Accused Pleading Guilty in Whole or Part.—If the accused person pleads guilty in whole or in part, and the partial plea (if any) is accepted by the prosecutor, the Sheriff pronounces sentence ;¹ or he can adjourn the case to another sitting of his Court, with a view to considering what sentence should be pronounced. He has this power whether the case is one the second diet of which is to be called in his own or in another Court.² Where the second diet is fixed for a different Court, any interlocutor disposing of any preliminary plea, any plea tendered, any interlocutor adjourning the case, or any sentence pronounced is written on the record copy of the Indictment. Where the plea is one of guilty to the Indictment or any part thereof, the accused person must sign it, if he is able to write. In every case, whether the plea is one of guilty or not guilty, the Sheriff must append his signature to the plea recorded.³

Where the person accused pleads guilty to only a part of a charge, or to a minor offence included in the charge, and the prosecutor does not accept such plea, or where on a plea of guilty to the whole charge the Sheriff considers it expedient in the circumstances, either on the representation of the accused person or otherwise, that the sentence should be determined by the Sheriff of the district of the second diet, an interlocutor in the form of sched. H. is written on the record copy of the Indictment and signed by the presiding Sheriff.⁴

The Sheriff Clerk, when the case has been remitted as above mentioned, records any interlocutors signed, plea tendered, or sentence pronounced. He does this in the books of Court or in a record kept for the purpose. He then transmits forthwith the record copy Indictment and extract convictions relative thereto to the Sheriff Clerk of the district of the Court of the second diet.⁵

Where the accused pleads guilty in whole or in part, and the Sheriff holds that any sentence which he can competently pronounce is inadequate, he may remit the accused to the High Court for sentence.⁶

In all cases where a person accused pleads guilty at the first diet, and is not forthwith sentenced by the Sheriff, he is detained in custody until he is sentenced, under the existing warrant of commitment.⁷ The Lord Advocate has power to consent to the accused being suffered to go at large. Where such consent is given, it is on such conditions as to bail as the Lord Advocate fixes.⁸ No unreasonable delay can be allowed to take place between the time of the accused pleading guilty and his being brought up for sentence.⁹

A plea of guilty may include both the charge and the previous convictions libelled as aggravations of the charge.¹⁰

¹ 1887 Act, § 28.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ 1921 Act, § 2.

⁷ 1887 Act, § 34.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *H.M. Adv. v. Davidson*, 1872, 2 Coup. 278.

Refusal of Accused to Plead.—If the accused person remains silent, refuses to plead, or makes a statement which is not a direct and unambiguous admission of guilt, or if there is reason to believe that he does not understand what he is being asked to do (for instance, if he is very deaf), the plea is recorded as one of not guilty.¹

Sentence.—On the plea of guilty being recorded, if sentence is to be pronounced at the same diet, the prosecutor moves for sentence. Unless he does this no sentence can be pronounced. The law agent of the accused is then heard in mitigation of punishment. At this stage he may lead evidence of good character. This is usually done by reading certificates, but witnesses may be examined if necessary. If an attempt is made to set up a false character, the prosecutor can lead evidence to rebut the proof led by the accused.

High Court Case.—The procedure at the first diet in a case which is to be tried before the High Court of Justiciary is in most respects the same as if the case were to proceed in the Sheriff Court. The main distinction arises where it is necessary to preserve the right of the High Court to decide legal questions arising in connexion with the proceedings, or to pronounce sentence.

If any objection of a preliminary nature is stated by the person accused, whether to the citation or relevancy or otherwise, the Sheriff hears the argument. If any objection is made in respect of a discrepancy between the record copy of the Indictment and the service copy, or of any error or deficiency in such service copy, or in the notice of citation, and the Sheriff is of opinion that such discrepancy, error, or deficiency could not mislead or prejudice the accused person, the accused is called upon to plead guilty or not guilty.²

The same course is followed if no preliminary objection is made, or if the Sheriff is of opinion that any such objection is frivolous. But if the Sheriff holds that a discrepancy, error, or deficiency is one which tended substantially to mislead and prejudice the accused person, or that any other preliminary objection is not frivolous, he endorses upon the record copy of the Indictment a certificate in the form of sched. K. This certificate notes generally the nature of the objections, and states that they are reserved for the consideration of the Court at the second diet.³

When the accused person is called upon to plead, a certificate of the plea tendered, in the form of sched. I., is endorsed upon the record copy of the Indictment. If the plea is one of guilty to the charge or part thereof, the accused person is required to sign it, if he is able to write. In every case, whether the plea is one of

¹ *Hutton*, 1840, Bell's Notes 231 ;
Macdonald 439.

² 1887 Act, § 29.

³ *Ibid.*

guilty or not guilty, the Sheriff must append his signature to the plea recorded.¹

The Sheriff Clerk records any certificate of the kind above mentioned. He makes this entry in the books of Court, or in a record to be kept for the purpose. He then transmits forthwith the record copy of the Indictment and extract convictions relative thereto to the Clerk of Justiciary.² It has already been mentioned that the documentary productions are usually lodged prior to the first diet. The Sheriff Clerk, therefore, transmits these along with the other papers.

Fugitation.—In the event of the accused person failing to appear, the High Court has a remedy which is not available in the Sheriff Court. This is called fugitation, and the condition which results from the sentence is called outlawry. It is pronounced under the following circumstances :—

- (a) The accused person must be a domiciled Scotsman or a Scotsman or foreigner who is charged with crime committed in Scotland.
- (b) He must have received a valid and legal citation or notice to appear.³ Objections may be stated to the sufficiency of the citation in the absence of the accused.
- (c) He must have failed without any just excuse to appear at a diet duly intimated to him.
- (d) The prosecutor must appear, insist in the charge and move for fugitation.

It is competent to move for forfeiture of the bail bond without moving for fugitation, if the prosecutor prefers that course.⁴

In addition to fugitation, the bail bond may be forfeited and a warrant to arrest and commit may be granted.

After fugitation the accused person is placed outside the law. Until reponed he can hold no office of trust, cannot appear in civil or criminal proceedings in any capacity, cannot be admitted to bail, and may be denounced as a rebel.⁵

The sentence is recalled or relaxed when the outlaw appears at the bar of the High Court, or upon petition to the Court. A sentence of outlawry is recalled *de jure* by the public prosecutor serving a new libel on the accused and placing him at the bar on that libel.⁶

Illustration.—Sweeney was indicted along with Monson on a charge of murder. He had not been apprehended, and was designed

¹ 1887 Act, § 29.

² *Ibid.*

³ Hume ii. 271; Macdonald 429; *H.M. Adv. v. Hannah*, 1883, 11 R. (J.) 9; 5 Coup. 346.

⁴ *H.M. Adv. v. Rodger*, 1879, 4 Coup. 301.

⁵ Hume ii. 270-272; Macdonald 429.

⁶ *H.M. Adv. v. Clyde*, 1875, 3 Coup. 149; *Archibald*, 1850, J. Shaw 288.

in the Indictment as residing at Ardlamont House, and the Indictment was served there. At the pleading diet at Inveraray he failed to appear. At the second diet in the High Court he again failed to appear, and on the motion of the Solicitor-General the Court pronounced sentence of fugitation against him. The charge against Monson having been subsequently found not proven, Sweeney, about five months thereafter, presented a Petition for recall of the sentence of fugitation pronounced against him. In the Petition he was designed as residing at an address in England. The Petition was duly intimated to the Crown authorities, and at a diet of the High Court on 21st May 1894, the Court, having heard counsel for the petitioner, and there being no appearance for the Crown, recalled the sentence of fugitation.¹

Pleas in Bar of Trial.—A plea in bar of trial must be stated at the first diet.² If such a plea is sustained, it effectually stops further procedure. It may be said generally, with regard to pleas of this sort, that if proof is required in their support, the Court can hear it without impanelling a jury.

The following are the principal pleas in bar of trial :—

- (a) That the accused person is under seven years of age.³
- (b) That he is insane at the time of trial, and unable to plead to the libel, or to give instructions for his defence.⁴
- (c) That he has already tholed an assize—that is to say, that the charge libelled has already been made against him and has been brought to proof.⁵

The essence is that the person tendering it has already been brought to trial and has stood his trial for, or pleaded guilty of, a specific offence duly set out in an Indictment or complaint.⁶ It is not necessary that an accused person should have been actually sentenced; it is enough that he has been found guilty, though, owing to an error in subsequent procedure, no sentence may have been passed upon him.⁷

The assize need not be tholed in Scotland.⁸

If after the previous trial an event has occurred which changes the character of the offence (as, for example, where a trial for assault has taken place and the injured party dies), the plea of *res judicata* will not exclude an Indictment for homicide.⁹ Further, if the

¹ *Sweeney v. H.M. Adv.*, 1893, 21 R. (J.) 44; 1 Adam 392.

² 1887 Act, §§ 28 & 29; *H.M. Adv. v. Brown*, 1907, S.C. (J.) 67; 5 Adam 312.

³ Macdonald 431.

⁴ P. 290 *sq.*, *infra*.

⁵ Hume ii. 470.

⁶ *Hilson v. Easson*, 1914, S.C. (J.) 99; 7 Adam 390.

⁷ *H.M. Adv. v. Fraser*, 1852, 1 Irv. 66.

⁸ *Macgregor and Inglis*, 1848, Arkley 49, at p. 60.

⁹ Macdonald 432; *H.M. Adv. v. O'Connor*, 1882, 5 Coup. 206.

earlier trial was stopped by some unforeseen accident or by something for which the prosecutor was not responsible, the plea will not avail the accused at a second trial.¹

(d) Where a witness is called by the prosecutor he cannot be charged for the offence in reference to which he depones.² The measure of the indemnity is the libel in support of which he gives evidence. It was formerly thought that the immunity enjoyed by a *socius criminis* who was adduced as a witness depended on a bargain between the witness and the Crown authorities, but the proper view appears to be that once the *socius criminis* is tendered as a witness that by itself precludes the Crown from prosecuting him in respect of matters covered by the libel.³

¹ Hume ii. 469 ; Alison ii. 618.

³ *Macmillan v. Murray*, 1920, J.C. 13.

² Macdonald 433.

CHAPTER VII

THE SECOND DIET OR DIET OF TRIAL

Calling the Diet.—At the calling of the second diet of compearance, whether in the Sheriff Court of a different district from the first diet, or in the High Court of Justiciary, the Clerk of Court, on the diet being called, enters in the books of Court, or in a record to be kept for the purpose, a transcript of the procedure at the first diet as endorsed on the record copy of the Indictment. But if the calling of the second diet is the same Court as that in which the first was called, the case proceeds in ordinary form.¹

Pleading.—The person accused is usually, although not necessarily, asked whether he adheres to his plea as recorded at the first diet. If he pleads guilty, the procedure is the same as if he had pled guilty at the first diet. If he adheres to the plea of not guilty, the case proceeds. It is competent to read the Indictment and ask the accused to plead; but the other mode is more convenient, and obviates the difficulty of alluding to previous convictions in the presence of those who have been cited to act as jurors. Section 67 of the 1887 Act provides that previous convictions against an accused shall not be laid before the jury, nor shall reference be made thereto before the verdict has been returned. It would be fatal to a conviction if such reference were made once the jury had been impanelled, but it has been held that where such reference was made in the presence of the jurors prior to the actual impanelling, the statute was not infringed.

Illustrations.—At the second diet in a Sheriff and jury trial, while the jury were present in Court, but before they had been impanelled, the Sheriff, in asking the panel to plead to the Indictment, referred to the statement therein that he had been previously convicted of theft and attempt to steal. In a suspension of a conviction by the jury, held that this was not an infringement of § 67 of the Act of 1887, in respect that the provision of that section only applied after the jury had been impanelled to try the case.²

At the second diet in a Sheriff and jury case, the Sheriff, in asking the accused to plead to the Indictment, referred to the fact mentioned therein of previous convictions. The jury were at that time in the jury-box, it having been arranged that the same jury which tried

¹ 1887 Act, § 40.

White v. H.M. Adv., 1901, 4 F. (J.) 3;

² *Cornwallis v. H.M. Adv.*, 1902, 4 F.; 3 Adam 479.

a previous case was to take the case in question. In a suspension of a conviction by the jury, held that the course pursued was not an infringement of § 67. Lord Justice-Clerk Macdonald said: "It is only on being sworn that the fifteen men called forward become a jury. Up to then they are only men summoned to act on a jury, and in that sense are jurymen, but there is no jury until the oath is taken. Therefore, I cannot hold that any breach of § 67 was committed in this case. . . . But I desire to add that it is worthy of consideration by my brother judges, both of this and the Sheriff Court, whether, in cases on Indictment, there should be any question put to the accused regarding his pleading to aggravations to the charge against him where these aggravations consist of previous convictions. It is plainly the spirit of the statute that these should not be before the minds of the jury in considering the question of guilt or innocence of the principal charge." . . . "I suggest, therefore, that there is no ground for interrogating the accused on that matter at the second diet. In my opinion he ought not to be so interrogated. . . . I see no objection to asking the accused at the second diet whether he adheres to his plea of not guilty tendered at the first diet, and it is my own invariable practice to do so. But I suggest that it is desirable that such an interrogation should not include a reference to the alleged previous convictions, which the accused, if he has not given the statutory notice under § 66, has no right to impugn."¹

Misnomers and Misdescriptions.—At this stage it is necessary to state any objection in respect of misnomer or misdescription of any person named in the Indictment, or of any person named in the list of witnesses, provided that the necessary notice has been given as already mentioned.² In the event of the Court being satisfied that the accused person has a just grievance in respect of any of these matters, the trial may be postponed or adjourned.³ It has to be observed that in these, and in all cases of necessary adjournment, a specified date must be fixed for the adjourned diet, and this date must be entered in the record.⁴

Amendment of Libel.—No trial fails, nor are the ends of justice allowed to be defeated, by reason of any discrepancy or variance between the Indictment and the evidence. The Indictment may be amended as undernoted so as to cure any such discrepancy or variance.⁵

It is competent at any time prior to the determination of the case, unless the Court see just cause to the contrary, to amend the

¹ *Cornwallis v. H.M. Adv.*, 1902, 4 F. (J.) 82; 3 Adam 604.

² 1887 Act, § 53.

³ *Ibid.*

⁴ *Fraser's*, 1852, 1 Irv. 1.

⁵ 1887 Act, § 70.

Indictment by deletion, alteration, or addition, so as to cure any error or defect therein, or to meet any objections thereto, or to cure any discrepancy or variance between the Indictment and the evidence. Any amendment so made is sufficiently authenticated by the initials of the Clerk of Court. Such amendment must not change the character of the offence charged. If the Court is of opinion that the accused may by such amendment be in any way prejudiced in his defence on the merits of the case, it grants such remedy to the accused by adjournment or otherwise as seems just.¹

Adjournment and Desertion of the Diet.—An adjournment at the second diet ought always to be avoided, if possible. Serious expense and inconvenience have been caused by the attendance of jurors and witnesses, and there is always the danger of losing valuable evidence in consequence of the delay. Sometimes, however, it is necessary to adjourn.² A material witness may be absent, although every effort has been made to secure his attendance; or new and important facts may have been discovered. The mere absence of a witness, where the proper means to secure his attendance have not been taken, or the fact that a witness has refused to be precognosed, is not a good ground for asking an adjournment.

Desertion *pro loco et tempore*.—Where a difficulty of a more serious character has emerged, the prosecutor may move the Court to desert the diet *pro loco et tempore*. The granting of this motion is in the discretion of the Court.³ The prosecutor may make this motion until the jury is sworn.⁴ He need not specify his reasons for making the motion,⁵ and it is usually granted without demur.

Where a diet is deserted *pro loco et tempore*, or is postponed or adjourned, or an order is issued for the trial to take place at a different place from that first given notice of, it is not necessary that a new warrant should be granted for the incarceration of the accused person. The warrant of commitment on which such person is at the time in custody continues in force.⁶

Where the diet is deserted *pro loco et tempore* and no order has been given by the Court postponing the trial or appointing it to be held at a subsequent date, provision is made for fixing another diet on due notice being given.⁷ The prosecutor may, however, proceed by means of a fresh Indictment.

¹ 1908 Act, §§ 30 and 77 (4).

² Macdonald 441.

³ Hume ii. 276; Alison ii. 98, 355.

⁴ *Ross and Others*, 1848, Ark. 481; *Martin*, 1858, 3 Irv. 177.

⁵ Alison ii. 356.

⁶ 1887 Act, § 52.

⁷ *Wood v. H.M. Adv.*, 1899, 2 F. (J.) 6; 3 Adam 64.

Illustration.—An Indictment was at the second diet deserted *pro loco et tempore*, and a new Indictment subsequently served seven days after that diet. In a suspension of a conviction it was maintained, *inter alia*, that under § 42 of the 1887 Act nine clear days induciæ should have been allowed to elapse before a new Indictment was served. The Lord Justice-Clerk Macdonald said: "I cannot agree to that proposition. When a criminal diet has been deserted *pro loco et tempore* for any reason, it is open to the prosecutor at any time to serve a new Indictment. That section merely makes it competent to the prosecutor, in place of serving a new Indictment, to serve a notice on the accused that he will be tried under the old Indictment on a certain date, and after the expiry of the induciæ prescribed in the section."¹

Where an Indictment in the Sheriff Court is from any cause not brought to trial at the second diet, and no order has been given by the Court postponing such trial, or appointing it to be held on a subsequent date at some other sitting of the Court, it is lawful at any time within nine clear days after the date of such second diet for the prosecutor to give notice to the accused person in the form of sched. N. annexed to the 1887 Act.² This notice is attached to a fresh copy of the Indictment. It calls upon the accused to appear to answer such Indictment at another diet.

Such notice may be given for a sitting of the Sheriff Court when the charge is one that can be lawfully tried in that Court, notwithstanding that the original citation to a second diet was to the High Court. Such notice must be given for a diet to be held not sooner than nine clear days subsequent to the notice. On or before the day on which such notice is given, a list of jurors is prepared, signed, and kept by the Sheriff Clerk of the district to which the new notice applies, in the same manner as for an ordinary second diet.³

Desertion *Simpliciter*.—The prosecutor may desert the diet *simpliciter*. The result of this is different. The prosecutor cannot prosecute again on the same libel, but he is not precluded from raising a new libel.⁴

Illustration.—The panel was charged at Perth Circuit with fraud. Lord Young sustained objections which were stated to the relevancy of the Indictment, and, refusing a motion by the prosecutor to desert the diet *pro loco et tempore*, dismissed the panel from the bar. The panel was subsequently reapprehended and indicted. Objections

¹ *Wood v. H.M. Adv.*, 1899, 2 F. (J.) 6; 3 Adam 64.

² 1887 Act, § 42.

³ *Ibid.*

⁴ Macdonald 442.

stated to the competency of further proceedings repelled. Lord Justice-General Inglis said: "Now, when a libel is found irrelevant, the course which is very usually followed is that the prosecutor moves the Court to desert the diet *pro loco et tempore*. But supposing the prosecutor not to do so—supposing he makes no motion at all—it is plain that the process must be got rid of somehow or other, and I apprehend that that is the very position of matters to which the observation of Baron Hume refers (Vol. II., p. 277), where he says: 'If the Court desert the diet on account of some objection to the citation or the form or relevancy of the libel, this also of its own nature is a special judgment relative only to that particular process, and it cannot hinder the raising of a new libel in better form.' That means, according to my reading of it, that whether the prosecutor make any motion on the subject or not, if the libel is found irrelevant the Court must get rid of the process, and may do so by deserting the diet *simpliciter*. But whether the diet is deserted *simpliciter* or not, or whether the Court simply dismisses the panel from the bar in respect of the libel being found irrelevant, it rather appears to me that the result will be the same. Dismissing the panel from the bar seems the logical consequence of finding the libel irrelevant. . . . This, however, is an entirely different proceeding from another which Baron Hume mentions, where the prosecutor moves the Court to desert the diet *simpliciter*. The effect of that is quite different, and it has been adjudged in a well-known case what that effect is [quotes from Hume]. Now, it appears to me that that expounds the law in this matter quite consistently and very clearly to be that the desertion of a diet *simpliciter* on the motion of the prosecutor is an end of all proceedings against the panel for the offence libelled against him." ¹

It is competent for the Court *ex proprio motu* to desert the diet *simpliciter*. If this course be taken it appears that the prosecutor is not precluded from raising a new libel.²

Postponement of Trial.—Apart from desertion of the diet, it is always competent for the Court to adjourn the diet,³ but unless there be some circumstance arising which leads the Court to see cause to adjourn over a day or days, every trial must proceed from day to day till concluded.⁴ If there is an adjournment, it must always be to a specified time and place, and these must be stated in a written interlocutor.

This is a strict rule and applies even if the adjournment is merely

¹ *H.M. Adv. v. Hall*, 1881, 8 R. (J.) 28; 4 Coup. 500.

² *Alison* ii. 357; *H.M. Adv. v. Tabran*, 1872, 2 Coup. 259.

³ *H.M. Adv. v. Rodger*, 1868, 1 Coup. 76; *H.M. Adv. v. Thomson*, 1871, 2 Coup. 103.

⁴ 1887 Act, § 55.

to a later hour on the same day. The rule does not apply, however, where the adjournment is merely for luncheon.¹

Illustrations.—A Sheriff having convicted a person, postponed sentence until a later hour in the same day without mentioning any adjournment of the diet. After having heard the evidence in the next case, in which the same person was accused, and made avizandum, he passed sentence upon him in the first case. It was held that the diet in the first case fell when the second case was called and the conviction was suspended.²

A person was indicted on a charge of theft and of being a habitual criminal. At the trial the jury found the prisoner guilty of theft. The jury was then resworn to inquire into the second charge, and found the accused to be a habitual criminal. Objection was raised to sentence being pronounced, on the ground that the diet had not been formally adjourned by written interlocutor after the verdict on the first charge. It was held that as the inquiry was one and continuous, no interlocutor or adjournment was needed.³

Sometimes an adjournment is rendered necessary by the illness of the panel.

Illustrations.—A jury having been sworn and the examination of the first witness begun, one of the panels became ill, and, having been examined by a medical man, he reported that she was not in a state to give instructions to her counsel for her defence. The Court refused to allow the trial to proceed against her, and the prosecutor having stated that it was important that the trial of both panels should proceed at the same diet, the Court continued the diet against both until the next day, and the jury impanelled were discharged. On the following day both panels were tried before another jury from the same list of assize.⁴

After a jury had been impanelled it appeared that, owing to illness, the panel was unable to give instructions for her defence, and the following interlocutor was pronounced: "Lord Mure, in respect of the evidence of the medical witnesses as to the present condition of the health of the accused, Refuses to allow the trial to proceed; Discharges the jury; reserving to the prosecutor to raise a new libel; and, on the motion of the counsel for the panel, ordains her to be recommitted to the prison of Ayr, until liberated in due course of law."⁵

Separation of Charges.—Where there is more than one charge the accused may move the Court to order the counts to be taken separately. It is in the discretion of the Court to grant or to refuse

¹ *Tocher v. H.M. Adv.*, 1927, J.C. 63.

⁴ *M'Queen and Henderson* (1849), J.

² *Corstorphine v. Jameson*, 1910, S.C. Shaw 252.
(J.) 25; 6 Adam 154.

³ *H.M. Adv. v. Gillan*, 1910, S.C.
(J.) 49; 6 Adam 205.

⁵ *H.M. Adv. v. Hamilton* (1880), 4
Coup. 344.

the motion. The criterion is the interests of justice ¹ and no general rule can be laid down.²

Illustration—An Indictment charged the accused with (1) indecent assault on one little girl and (2) indecent assault, involving murder, upon another little girl. Both offences were libelled as having been committed on the same day at Stirling. It was held that as the offences charged were so connected in time, circumstances, and character as to justify their inclusion in one Indictment. Thereafter the panel was tried before the Lord Justice-Clerk and a jury. In the course of his charge to the jury, the Lord Justice-Clerk directed them that, in reaching a conclusion upon the second charge, they were neither bound nor entitled to shut their eyes to what they might consider to have been proved under the first charge.

Separation of Trials.—The accused may make a special motion for separation of the trials, where two or more persons are charged in the one Indictment. The Court may order separation if it appears oppressive to proceed with the joint trials.

The matter is entirely one for the discretion of the presiding judge and his exercise of that discretion will not be lightly interfered with.³ It is not a sufficient ground *per se* that one accused proposes to examine the other as a witness.⁴

Illustrations.—In an Indictment five panels were charged with concealing property belonging to the estates of three bankrupts (of whom two were among the panels), with intent to defraud creditors. There were eight charges. One of the panels was only implicated in one charge, but the others were connected with two or more of the charges. All the charges were of the same nature and occurring about the same time and place. At the trial a motion for separation of trials was granted by the Sheriff in the case of the panel who was only connected with one charge, but refused as regards the others. A suspension of a conviction of three of the panels based, *inter alia*, on (1) the refusal to separate the trials, and (2) the ground that the accumulation of charges amounted to oppression, refused. Lord Moncreiff said: "A motion for separation of trial is very frequently made, but very seldom granted. Still more seldom does this Court quash a conviction on the ground that it has been refused. There may be other cases, but at present I know of no other except *Kerr v. Phyn*. The reason is that the question is one for the discretion of the presiding judge, and unless it can be made out

¹ Hume ii. 171; Alison ii. 238; *H.M. Adv. v. Thomson*, 1857, 2 Irv. 747; *H.M. Adv. v. Pritchard*, 1865, 5 Irv. 88.

² *H.M. Adv. v. Bickerstaff*, 1926, J.C. 65, *per* L.J.G. Clyde, at p. 75.

³ *Sangster v. H.M. Adv.*, *infra*; *Collison v. Mitchell*, *infra*.

⁴ Macdonald 444; *H.M. Adv. v. Parker and Barrie*, 1888, 16 R. (J.) 5; 2 White 79; *Gemmell and M'Fadyen v. Macniven*, 1928, J.C.5. But see *H.M. Adv. v. M'Heer*, 1869, 1 Coup. 390; *H.M. Adv. v. Turner*, 1881, 18 S.L.R. 491.

conclusively that he was wrong in the exercise of that discretion we will not interfere.”¹

The case of *Kerr v. Phyn*,² referred to by Lord Moncreiff, was a prosecution against a master and servant under one complaint for a contravention of the Salmon Fisheries (Scotland) Act, 1868, § 21. That section throws the burden of proving innocence upon the accused. A motion for separation of the trials was made in order that the servant might be examined as a witness for the master. The motion was refused, and the Sheriff convicted both the accused. On appeal to the Circuit Court at Dumfries, Lord Young suspended the conviction. His Lordship held that the charge should have been laid against the master alone. The case, therefore, is not quite in point on the question of separation of trials, but it illustrates a case where, assuming that the charge was well laid against both the accused, a separation of trials might well have been granted, as the evidence of the servant might obviously have been most material for the defence of his master.

A father and daughter were charged in one complaint with selling exciseable liquors without a licence. A motion for separation of trials was refused. The case of *Kerr v. Phyn* being founded on, the Court refused a suspension based, *inter alia*, on this ground. Lord Justice-Clerk Macdonald said: “Now, separation of trials is always a matter peculiarly for the discretion of the judge trying the case. I do not say that there might not be a case in which the prosecutor, for the sole purpose of depriving the accused of the only evidence which would be available to them in their defence, had included a number of onlookers, it may be, in the complaint, the judge might and should interfere to prevent oppression; but in ordinary circumstances this Court will not interfere with the discretion of the judge trying a case in which two persons are charged, where he has applied his mind to the question and has refused to separate the trials.”³

A number of cases have arisen where the masters or pilots of colliding vessels have been charged. Sometimes separation has been allowed,⁴ sometimes not.⁵ But where the master and mate of a vessel were charged with culpable homicide or culpable and reckless neglect of duty whereby a collision occurred and life was lost, a motion for separation was granted.⁶

Review of Proceedings at First Diet.—The Court has power to review the proceedings at the first diet.⁷ Where the accused has

¹ *Sangster v. H.M. Adv.*, 1896, 24 R. (J.) 3; 2 Adam 182.

² *Kerr v. Phyn*, 1893, 20 R. (J.) 60; 3 White 480.

³ *Collison v. Mitchell*, 1897, 24 R. (J.) 52; 2 Adam 277.

⁴ *Clelland v. Sinclair*, 1887, 14 R. (J.) 23.

⁵ *H.M. Adv. v. Parker and Barrie*, *supra*.

⁶ *H.M. Adv. v. Drever*, 1885, 5 Coup. 680.

⁷ 1887 Act, § 41.

pled guilty to the whole or any part of the charge at the first diet, but it is shown at the second diet that such plea was taken to an irrelevant or incompetent charge, or under substantial error or misconception, or under circumstances which tended to prejudice the accused, the Court may allow such plea to be withdrawn or modified.¹

In this case the prosecutor may move the Court to desert the diet *pro loco et tempore*, or to postpone the trial to a later date. If the diet is deserted *pro loco et tempore*, notice of the new diet in the form of sched. N. may be given to the accused, as already explained.² If the trial is postponed, the adjourned diet is notified to the accused in open Court. Where such postponement makes it necessary that the jury for the trial of the case shall be taken from a different list from that of which notice was given, such list is prepared, signed, and kept in the office of the proper Sheriff Clerk within three clear days of the postponed diet.

When the accused has pled guilty at the first diet, any Lord Commissioner of Justiciary in chambers, and without the presence of the prosecutor or person accused, may adjourn the second diet to any other sitting of the High Court of Justiciary.³

In the event of a trial being transferred, when there are too few cases for a separate Court,⁴ or if a sitting of the High Court is dispensed with, such cases as remain for trial may be ordered to be brought up at another Court.⁵ In either case a notice in the form of sched. O. is served upon each person accused who may have been already cited.⁶

Insanity of Prisoner.—This matter is discussed in a later chapter.⁷

Impanelling the Jury.—The members of the jury are balloted by the Sheriff Clerk. Fifteen are chosen, five special and ten common. Where an accused was convicted by the verdict of a jury composed of six special and nine common jurors, and brought a suspension, the suspension was refused on the ground that he could competently have challenged the sixth special juror before the jury was sworn.⁸ The same ground of judgment was applied where a suspension was brought because three jurymen had been balloted and served on the jury whose names were not included in the copy of the assize supplied to the accused in terms of the statutory provision.⁹ They are selected from the List of Jurors prepared in the manner already described.¹⁰ The names of the persons in the list are usually called

¹ 1887 Act, § 41.

² P. 98, *supra*.

³ 1887 Act, § 49.

⁴ P. 8, *supra*.

⁵ 1887 Act, § 48.

⁶ *Ibid.* § 50.

⁷ P. 288 *et seq.*, *infra*.

⁸ *Torri v. H.M. Adv.*, 1923, J.C. 52.

⁹ *M^cArthur v. H.M. Adv.*, 1902, 10 S.L.T. 310.

¹⁰ P. 70, *supra*.

by the Sheriff Clerk before the judge takes his seat on the bench. If any fail to answer to their names, these names are again called after the judge takes his seat, and if they are not then present, they are liable to be fined.

If a juror fails to answer to his name after being openly called three times, and if no reasonable excuse for absence is established on his behalf, he is liable, upon proof by oath of a credible person that he has been properly cited, to a penalty of from £2 to £5, as the Court may think reasonable.¹ The following are sufficient excuses : (a) That the juror is so ill that he cannot attend without injury to his health ; (b) that the juror's age exceeds sixty years ; (c) that the juror is exempt from service in virtue of an Act of Parliament.² A medical certificate of illness, or a certificate of age, should be sent to the Sheriff Clerk previous to the date of trial. In the event of the excuse for non-attendance being held sufficient, it is now competent to obtain remission of fines paid.³

As each juror is balloted he may be challenged by the prosecutor or the persons accused, each of whom has five peremptory challenges, of which not more than two can be made to special jurors.⁴ It is not usual for the Crown to challenge any jurors. Beyond these peremptory challenges, no challenge is allowed unless on special cause shown. A sufficient cause would be infamy, outlawry, insanity, deafness, dumbness, blindness, minority, relationship, or enmity, on the part of the juror.

Where more trials than one take place on the same day, it is competent, with the consent of the prosecutor and person accused, to use the same jury for more than one trial.⁵

The jury having been balloted, the Sheriff Clerk informs them of the charge against the person accused. He does this in the form set forth in sched. P. of the 1887 Act.⁶ It is not necessary to lay before the jury copies of the Indictment, list of witnesses, or list of productions. In reading the charge, the Clerk must be careful to make no reference to previous convictions libelled in the Indictment.⁷

If he does so, the proceedings before that jury must stop.

The Clerk of Court then administers the oath to the jury. He asks them to stand, hold up their right hands, and take the following oath : " You fifteen swear by Almighty God, and as you shall answer to God at the great Day of Judgment, that you will truth say and no truth conceal, in so far as you are to pass on this assize." In the rare case of a juror objecting to be sworn on the ground that he has no religious belief, or that the taking of an oath is contrary to his religious belief, he is permitted to make a solemn affirmation.⁸

¹ 55 Geo. III. c. 42, § 22.

² P. 70, *supra*.

³ Act of Sederunt, 19th March 1925.

⁴ 6 Geo. IV. c. 22, § 16.

⁵ *Ibid.* § 18.

⁶ 1887 Act, § 54.

⁷ *Ibid.* § 67.

⁸ 51 & 52 Vict. c. 46.

The following is the form : “ I, Thomas Smith, do solemnly, sincerely, and truly declare and affirm that I will truth say and no truth conceal, in so far as I am to pass on this assize.” After the oath or affirmation is administered, the jurors sit down and the Clerk records their names and addresses.

It will be convenient at this place to mention the rules which regulate the management of the jury. After the jury is sworn, no private communication between a juror and any person can be permitted. No juryman can leave the Court, except in the charge of an officer, until the verdict has been delivered or the jury has been discharged.¹

If the trial is adjourned from one day to another, it is not necessary that the jury should be secluded during the adjournment, except in any case in which a sentence of capital punishment may follow on conviction, or in which the Court shall see fit, either *ex proprio motu* or on the motion of the prosecutor or the person accused, to order that the jury be kept secluded.²

It sometimes happens that a juryman is taken ill during the proceedings. If this happens at an early stage, it is competent, with consent of the person accused, to ballot for another juryman, re-swear the whole jury, recall the witnesses, and get them to repeat their evidence as noted by the judge.³ If it occurs at a period so late that this course would be inconvenient, there is no remedy but a motion by the prosecutor for leave to abandon further proceedings on the present Indictment.⁴ As already mentioned, the person accused is not held under these circumstances to have tholed an assize.⁵ He may, therefore, be proceeded against upon a new Indictment.

In one case, in which the circumstances were very special, a conviction was quashed in respect that one juryman in the possession of private information communicated it to his fellow-jurors.⁶

Trial.—After the jury has been sworn, any special defence, of which notice has been duly given, is read to them.⁷ The evidence is then led.⁸ The whole evidence must be taken in the presence of the accused.⁹ Once the case for the prosecution is closed, it is incompetent for the prosecutor to call a further witness.¹⁰ If the accused elects to give evidence on his own behalf, and is the

¹ Hume ii. 417 ; Alison ii. 631.

² 1887 Act, § 55.

³ *H.M. Adv. v. Lundie*, 1868, 1 Coup. 86 ; *M'Garth v. Bathgate*, 1869, 1 Coup. 260 ; *H.M. Adv. v. M'Vean* (1903), 10 S.L.T. 648.

⁴ *H.M. Adv. v. Crossan*, 1869, 1 Coup. 383.

⁵ *Laird and Hosie v. H.M. Adv.*, 1922, J.C. 17.

⁶ *Verner v. H.M. Adv.*, 1916, 2 S.L.T. 330.

⁷ P. 68, *supra*.

⁸ Evidence in criminal cases is discussed *infra*, Part III., ch. III., p. 266.

⁹ Cf. p. 193, *infra*.

¹⁰ *Docherty v. M'Lennan*, 1912, S.C. (J.) 102 ; 6 Adam 700.

only witness as to the facts of the case, he must be called as a witness immediately after the Crown case is closed.¹ The presiding judge must take a note of the evidence.² It is now necessary in all trials on Indictment for shorthand notes of the evidence to be taken.³ The consideration of some specialties of criminal evidence is reserved till a later chapter.⁴

The accused person may at any stage withdraw his plea and tender a plea of "guilty as libelled," or a modified plea of guilty. If he does so, and the prosecutor accepts such modified plea, the jury returns a formal verdict of guilty, in conformity with the plea.

In the same way, if the prosecutor abandons the trial, or the case breaks down in any way, the jury returns a formal verdict of not guilty, and the accused person is discharged from the bar.

The last step in the proof for the prosecution is the reading of the declaration emitted by the accused person, if it is considered necessary to produce it.

The declaration is received in evidence without being sworn to by witnesses; but it is competent for the person accused, before such declaration is read to the jury, to adduce as witnesses the persons who were present when the declaration was emitted, and to examine them upon any grounds of objection to the reception in evidence of the declaration. He may move the Court to refuse to allow the declaration to be read either on grounds appearing on the face of the declaration itself, or on the ground of what has been disclosed in the examination of witnesses above mentioned, or on both of these grounds. Where the accused objects to the declaration, the prosecutor is entitled to examine the witnesses whom the accused might have examined.⁵

After the conclusion of the evidence for both parties, the prosecutor and the agent or Counsel for the defence, if they so desire, address the jury. In doing so, it is not a valid ground for objecting to the sufficiency of evidence led as to the identity of any person, corporation, or company, or of any place or thing, that certain particulars set forth in regard thereto in the Indictment have not been proved. It is sufficient if the identity of such person, place, or thing has been proved.⁶ If the accused does not elect to give evidence on his own behalf, the prosecutor is not permitted to refer to the fact.⁷

At the conclusion of the addresses the judge charges the jury. The judge is entitled to draw the attention of the jury to the fact that the accused did not elect to give evidence on his own behalf.⁸

¹ 61 & 62 Vict. c. 36, § 2.

² 23 Geo. III. c. 45; 9 Geo. IV. c. 92,

§ 17, 1926 Act, § 5.

³ 1926 Act, § 11 (1).

⁴ P. 266, *infra*.

⁵ 1887 Act, § 69.

⁶ *Ibid.* § 68.

⁷ 61 & 62 Vict. c. 36, § 1 (b).

⁸ *Brown v. Macpherson*, 1918, S.C. (J.) 3.

Where a judge after summing up handed certain written questions to the jury for their consideration which were not exhaustive of the case, it was held that such a practice was not illegal but that it was desirable to adhere to the traditional practice.¹ After the charge the jury may either pronounce their verdict at once, or retire to consider it.²

Verdict.—The first duty of the jury is to elect a chancellor. Having done this, they proceed to consider their verdict. This may be returned by a majority. It is not necessary for the jury to hear the trial to a finish. They may, at the conclusion of the Crown case, bring in a verdict in favour of the accused.³ On the return of the jury, if they have retired or, if they have remained in the box, on their being agreed upon their verdict, the Sheriff Clerk asks them whether they have elected a chancellor. The person chosen then rises and states that he has been appointed. The Clerk asks him if the jury have agreed upon their verdict, and, if so, what they say. The chancellor announces the verdict which is recorded by the Clerk. After the verdict is recorded it should be read over to the jury and their assent to its recorded terms obtained.⁴

If the verdict is one of not guilty, or not proven, the accused is dismissed from the bar.

Three kinds of verdict may be returned—guilty, not guilty, or not proven. The essential qualities of the verdict are :—

- (a) It must in express terms find the accused guilty or not guilty, or the charge not proven.
- (b) Its terms must be consistent with the Indictment.⁵ When the Indictment is composed of one charge only or of cumulative charges the proper verdict is the general one of “ guilty,” and it should be duly recorded as a verdict of guilty as libelled. The verdict ought to dispose of the whole libel with the exception of any charges which have been departed from. If the verdict deals with some only of the charges and ignores others, the accused is held to be acquitted of those ignored. But where the charges are not cumulative but truly alternative a verdict of guilty as libelled is bad.⁶
- (c) The verdict must be unambiguous.⁷

¹ *Cameron v. H.M. Adv.*, 1924, J.C. 101.

² 54 Geo. III. c. 67, § 1.

³ *H.M. Adv. v. Craig*, 1865, 5 Irv. 523.

⁴ *Torri v. H.M. Advocate*, 1923, J.C. 52.

⁵ *Macmillan v. H.M. Adv.*, 1888, 25 S.L.R. 315; 1 White 572; *Angus v.*

H.M. Adv., 1905, 8 F. (J.) 10; 4 Adam 640.

⁶ See further, p. 198, *infra*.

⁷ *Paterson v. H.M. Adv.*, 1901, 4 F. (J.) 7; 3 Adam 490; *Lloyd v. H.M. Adv.*, 1899, 1 F. (J.) 31; 2 Adam 637; *Townsend v. H.M. Adv.*, 1914, S.C. (J.) 85; 7 Adam 378.

The provisions of the 1887 Act have greatly extended the powers of the jury in regard to the verdict which they may return. These provisions may be summarised thus :—

- (a) Under an Indictment for robbery, or for theft, or for breach of trust and embezzlement, or for falsehood, fraud, and wilful imposition, the accused may be convicted of reset.¹

Illustration.—An Indictment charged the accused with theft of sheep. The jury found the charge of theft not proven, but found the accused “ guilty of reset.” In a suspension the accused pleaded that the verdict was disconform to the Indictment and wanting in necessary specification. The Court held that the verdict was sufficiently specific. Lord Justice-Clerk Macdonald said : “ Now, I think that caution ought to be exercised in these cases as to the form of the verdict, because the charge is one of theft, and the conviction one of reset. But here I think the verdict is quite sufficient under the provisions of the Criminal Procedure Act, 1887. What the prisoner is charged with is the theft of certain sheep ; what he is convicted of is reset of theft. You may read the Indictment, in the light of the provisions of the Criminal Procedure Act, 1887, as a charge that he did reset these sheep, well knowing them to be stolen, and I think the course taken by the jury was perfectly competent, and that no exception can be taken to the verdict as recorded.” Lord M'Laren, in concurring, said : “ A better verdict might have been to find the prisoner guilty of reset of theft, in that he received the sheep libelled, knowing them to be stolen.”²

- (b) Under an Indictment for robbery, or for breach of trust and embezzlement, or for falsehood, fraud, and wilful imposition, the accused may be convicted of theft.³
- (c) Under an Indictment for theft the accused may be convicted of breach of trust and embezzlement or of falsehood, fraud, and wilful imposition.⁴
- (d) Under an Indictment for theft the accused may be convicted of theft, although the circumstances proved amount in law to robbery.⁵
- (e) Under an Indictment charging cumulatively two or more crimes or acts of crime, the accused may be convicted of any one or more of them.⁶
- (f) Under an Indictment containing a charge, any part of which constitutes in itself an indictable crime, such part is separable, and the accused may be convicted thereof.⁷

¹ § 59.

⁴ *Ibid.* ; *H.M. Adv. v. Laing*, 1891,

² *Kennedy v. H.M. Adv.*, 1896, 23 R. (J.) 28 ; 2 Adam 51.

⁵ *White* 572.

⁶ *Ibid.*

⁷ § 60.

³ § 59.

⁷ *Ibid.*

- (g) Under an Indictment charging crime committed with a particular intent, or with particular circumstances of aggravation, the accused may be convicted of the crime without such intent or aggravation.¹
- (h) Under an Indictment which charges a completed crime, the accused may be convicted of an attempt to commit such crime.²
- (i) Under an Indictment charging an attempt to commit a crime, the accused may be convicted of such attempt although the evidence is sufficient to prove the completion of the crime said to have been attempted.³
- (j) Under an Indictment which charges a crime which imports personal injury inflicted by the accused, resulting in death or serious injury to the person, the accused may be convicted of the assault or other injurious act, and also of the aggravation that such assault or act was committed with intent to commit such crime.⁴
- (k) Under an Indictment setting forth any act as contrary to an Act of Parliament, which is also criminal at common law, the accused may be convicted of the common law crime.⁵
- (l) Under an Indictment charging a statutory offence, where the facts proved do not amount to a contravention of the statute, but do amount to a crime at common law, the accused may be convicted of the common law crime.⁶

This provision should be kept in mind in framing Indictments. It does not mean that if a statutory crime is specifically charged, there being no such crime at common law, that if the statutory charge breaks down while a common law offence emerges, the prosecutor is entitled to obtain a conviction for the common law offence. But if the Indictment is framed narrating facts which, while constituting a statutory offence, at the same time cover a lesser common law offence, then a conviction on the lesser offence is good.

Illustration.—The accused was charged with a contravention of § 4 of the Bankruptcy Frauds and Disabilities (Scotland) Act, 1884, obtaining credit to the extent of £20 and upwards without disclosing that he was an undischarged bankrupt. On the first witness for the prosecution being examined, it appeared that the goods had not been supplied on credit and had been paid for. The case on the statute accordingly broke down, but the Sheriff-Substitute allowed the case to proceed, and at the close the Procurator-Fiscal asked for a conviction at common law on a charge of fraud. The Sheriff-Substitute adjusted a verdict in the following terms, to which

¹ § 60.

² § 61.

³ *Ibid.*

⁴ *Ibid.*

⁵ § 62.

⁶ *Ibid.*

the jury assented : " The jury by a majority found the panel guilty of having, on 24th September and 5th November, in the premises of J. T. & Sons, Leicester, pretended that he was J. Richmond, carrying on business at Coatbridge, and thus induced them to send him goods to the amount of £30. 5s. 6d., which he received and appropriated to his own uses in" The Court suspended the conviction. Lord Justice-Clerk Macdonald said, referring to the charge made against the accused : " That was a statutory charge of a distinct kind, and a charge which on the face of it set forth no crime at common law at all. The first part of § 62 of the Criminal Procedure Act does not therefore apply. It appears that when the prosecutor had attempted to prove that the prisoner had obtained credit, the evidence disclosed that this was not the case, and accordingly the prosecutor's case on the statutory charge completely broke down." His Lordship, after referring to the verdict and quoting the section of the 1887 Act, second part of § 62, said : " I have no doubt that these words mean this—' the facts proved under such an Indictment being facts charged in the narrative of the Indictment.' But I do not hold that these words amount to this, that if it should drop out in the evidence that some other crime might have been charged than the crime stated in the Indictment, then it is competent to convict the accused of that other crime." Lord Rutherford Clark said : " I think the prosecutor was not entitled to lead evidence upon any facts that were not charged in the Indictment." Lord Trayner said : " If an Indictment charges a prisoner with a statutory offence, the *species facti* being also sufficient to constitute an offence at common law, the accused may, on such an Indictment, be convicted of the offence at common law. But to allow a prosecutor to prove facts not charged is, I think, quite unwarrantable and wholly improper." ¹

In virtue of § 9 of the Criminal Law Amendment Act, 1885, it is competent on an Indictment libelling only a common law charge of rape, to return a verdict finding a panel guilty of offences created by that statute, even although the Indictment does not set forth the statute.² But where the common law charge is not one of rape but only of attempt to ravish, § 9 does not apply.³

Jury's Right to See Productions.—The question whether or not the jury is entitled to see the productions, or any of them, is in the discretion of the presiding judge.

Illustrations.—In a Sheriff and jury trial for forgery the Sheriff allowed the jury to take with them into the jury-room certain

¹ *Markland v. H.M. Adv.*, 1891, 18 R. (J.) 50 ; 3 White 21.

² *H.M. Adv. v. Watson*, 1885, 13 R. (J.) 6 ; 5 Coup. 696 ; *H.M. Adv. v. M' Laren*, 1897, 25 R. (J.) 25 ; 2 Adam

395 ; *H.M. Adv. v. Barbour*, 1887, 1 White 466.

³ *Townsend v. H.M. Adv.*, 1914, S.C. (J.) 85 ; 7 Adam 378.

documents which had been produced by the prosecution to prove that the signatures alleged to be forged were in the handwriting of the accused. They were also allowed to take with them a sketch made by the expert in handwriting called by the Crown while in the witness-box, illustrating the forged signatures. In a suspension of a conviction, held that there was nothing incompetent or illegal in the course adopted, the matter being one for the discretion of the Court. Lord Justice-Clerk Macdonald : "The first question here is whether it is an illegal thing in a criminal trial that the jury should see documents produced at the trial in the jury-room. There is no question raised as to their seeing them in the jury-box, and I cannot see the distinction in this particular between the jury-box and the jury-room." His Lordship then referred to the cases of *Robertson* (1849), J. Shaw, 186, and *M'Gall* (1849), J. Shaw, 194, pointing out that all that these cases amounted to was that in certain cases it was inexpedient for the jury to take the productions with them when they retired : "But advisability is quite a different thing from competency or legality, and I can see no incompetency or illegality in the jury having the documents if the judge, in the exercise of his discretion, thinks it right that they should. . . . The only other point in the case is whether a tracing having been made by a witness while in the box, and handed to the jury, any illegality was thereby committed. I think there is nothing before us to indicate any illegality. Many things spoken to by a witness may require illustration, and the witness may illustrate them on the spot." ¹

In a charge of sheep-stealing, the sheep were entered in the list of productions, and were penned outside the court during the trial. After the close of the prosecution case, the agent for the panel moved that the jury be asked to examine the sheep, it being alleged that the accused had altered and defaced the original brands on the horns and ear-marks. The motion was refused. In a suspension, held that this refusal was not a good ground for suspension. ²

Motion for Sentence.—If the verdict is one of guilty, and there are no previous convictions, the prosecutor moves for sentence. If he does not do so, sentence cannot be pronounced.

Previous Convictions.—If previous convictions are libelled, the prosecutor now mentions the fact for the first time, unless these have formed part of the competent evidence in support of the charge, in which case they will have been proved along with the rest of the case for the prosecution. ³ The extracts produced are usually admitted by the accused without dispute.

¹ *Slater v. H.M. Adv.*, 1899, 2 F. (J.) 4; 3 Adam 73.

² *Paterson v. H.M. Adv.*, 1901, 4 F. (J.) 7; 3 Adam 490.

³ P. 61, *supra*.

An extract conviction of a crime committed in any part of the United Kingdom, bearing to be under the hand of the officer in use to give out such extract, is received in evidence without being sworn to by witnesses.¹ It is held to apply to the person accused, to whom notice is given in the list of productions that it is to be used against him.²

If the accused person intends to object to the reception of such evidence on the ground that the extract is not under the hand of the proper officer, or that it does not apply to the accused, or that it is otherwise invalid or inadmissible, he must give written notice to the Procurator-Fiscal of the district of the second diet, or to the Crown Agent in a High Court case, as already explained.³ Where such notice has been given, the conviction, and any facts relevant to its admissibility, are proved by a witness or witnesses, although the name of any such witness be not included in the list in the Indictment. The accused is also entitled to examine witnesses in regard thereto. An official of any prison in which the accused may have been confined on such conviction is a competent and sufficient witness to prove the application thereof to the accused, although he may not have been present in Court at the trial to which the extract relates.⁴ But the prosecutor must prove the application of the conviction to the accused by the ordinary rules of evidence and where the only evidence led was that of a police constable who was not an official of the prison in which the accused had been confined and had not been present in Court when the accused was convicted, it was held that the application of the previous conviction to the accused had not been proved.⁵

Previous convictions against a person accused are not laid before the jury, and no reference can be made thereto in presence of the jury before the verdict is returned.⁶ This provision does not prevent the public prosecutor from leading such evidence, where it is competent to lead the same as evidence *in causa* in support of the substantive charge, or where the person accused leads evidence to prove previous good character.⁷

It is unnecessary for the jury to return a verdict on the subject of previous convictions. The admission of any conviction is a matter for the Court. Where the conviction is admitted or proved, the Court has power to take it into consideration in awarding punishment.

The Clerk of Court in which sentence is pronounced enters in the record a statement of the contents of any extract conviction put in evidence, setting forth date, place of trial, court, crime, aggravations

¹ 1887 Act, § 66.

² *Ibid.*

³ P. 70, *supra*.

⁴ *Ibid.*

⁵ *M'Dermott v. Stewart's Trs.*, 1918, J.C. 25.

⁶ 1887 Act, § 67, p. 95, *supra*.

⁷ *Ibid.*

(if any), and sentence. Where the accused is again charged with an offence in regard to which such conviction may be competently used as an aggravation, a duly certified extract of the conviction, setting forth the particulars of previous convictions above mentioned, is admissible and sufficient as evidence to prove both the conviction and aggravations.¹

Where the accused is convicted on Indictment in the Sheriff Court of any crime, and an extract of that conviction is subsequently required in evidence, such extract can be issued by the Clerk of the Court having the custody of the record copy of the Indictment, although the plea of the accused may have been taken and the sentence on him pronounced in another Court.² It is still competent, notwithstanding the provisions in § 67 of the 1887 Act, to lay before the jury evidence that the accused is habit and repute a thief, where this aggravation is libelled in the Indictment. If such an aggravation be libelled, it is necessary to prove previous convictions.³

Since the passing of the 1887 Act, it is only in exceptional cases that the aggravation of habit and repute has been founded upon. It is not infrequent, however, in cases of reset to take advantage of the provisions in § 19 of the Prevention of Crime Act, 1871, which enable a prosecutor, on giving seven days' notice in writing to the accused, to prove, after evidence has been led of the accused being found in possession of stolen property, that he has within the immediately preceding five years been convicted of any crime inferring fraud or dishonesty; and looking to the difficulty in cases of reset of proving guilty knowledge, it seems quite proper to adopt such a course. The case of *Watson v. H.M. Advocate*⁴ defines the stage at which evidence of convictions may be led.

In a prosecution under the Prevention of Crime Act, 1871, it was held that in view of § 67 of the 1887 Act the production of an extract of a previous conviction or Indictment in the Sheriff Court of theft aggravated by five previous convictions, three of theft and two of attempt to steal, scheduled thereto, was in the absence of any objection by the prisoner sufficient evidence both of a conviction on Indictment of a "crime" and the previous conviction of a "crime," within the meaning of the Prevention of Crime Act.⁵

Sentence.—After the previous convictions have been admitted or proved, as the case may be, the accused may state any plea in bar of sentence. These pleas must relate to the sufficiency of the

¹ 1887 Act, § 67.

² 1908 Act, § 77 (3).

³ *H.M. Adv. v. Hunter*, 1890, 17 R. (J.) 57; 2 White 501. See also *H.M. Adv. v. Browne*, 1903, 6 F. (J.) 24.

⁴ *Watson v. H.M. Adv.*, 1894, 21 R. (J.) 26; 1 Adam 355.

⁵ *Martin v. Boyd*, 1908, S.C. (J.) 52; 5 Adam 528.

verdict or to the condition of the accused ; for example, the accused may have become insane,¹ or, if a woman, may be pregnant.

The Counsel or agent of the accused is then heard in mitigation of sentence. At this stage evidence as to previous good character may be adduced in the same way as at the first diet.²

The judge then pronounces sentence. In all cases, whether in the Sheriff Court or in the High Court, the sentence to be pronounced is announced by the judge in open Court.³ All sentences, except sentence of death, are entered in the record in short form. It is unnecessary to read the entry of the sentence from the record. The High Court, by Act of Adjournal, prescribes the form and mode in which sentence of death is entered.⁴

A valid sentence must contain the following points :—

- (a) It must be consistent with the law.
- (b) It must be consistent with the libel, whether Indictment or complaint.
- (c) It must state a definite and unambiguous period of imprisonment or amount of fine.

The subject of punishment is treated in Part III., Chapter I.

All sentences, unless qualified, run from the date of pronouncing judgment. If the accused person is already in prison upon a previous sentence, his imprisonment may be made to date from the expiry of such sentence.

Remit to High Court for Sentence.—The Criminal Procedure Act, 1921, provides that in proceedings on Indictment in which the second diet is in the Sheriff Court, where the accused is found guilty by the jury, the Sheriff, if he holds that any sentence which he can competently pronounce is inadequate, may remit the accused to the High Court for sentence.⁵

Procedure peculiar to High Court.—The procedure at the second diet in the High Court is practically the same as we have described in the Sheriff Court.

¹ *H.M. Adv. v. Small*, 1880, 4 Coup. 388 ; *H.M. Adv. v. Fergusson*, 1894, 1 Adam 517. And see *H.M. Adv. v. Gordon*, 1921, J.C. 67.

² P. 91, *supra*, p. 281, *infra*.

³ 1887 Act, § 57.

⁴ *Ibid.* See p. 229, *infra*.

⁵ 1921 Act, § 2.

CHAPTER VIII

APPEAL

UNTIL the passing of the Criminal Appeal (Scotland) Act, 1926,¹ all interlocutors and sentences pronounced by the High Court of Justiciary were final and conclusive, and not subject to review in any circumstances. The finality of the High Court was regulated by § 72 of the 1887 Act. This section is not repealed, but is declared by § 17 (2) of the 1926 Act to have effect subject to the provisions of that Act. The result of the 1926 Act is to allow a person convicted in the High Court on Indictment before a single judge and jury to appeal on certain specified grounds to a Court of three judges,² whose decision is final.³

As the Act applies to all trials on Indictment, a person convicted on Indictment in the Sheriff Court has the same right of appeal as a person convicted in the High Court. Even prior to the passing of the 1926 Act, a person convicted on Indictment in the Sheriff Court could, in certain circumstances, bring a suspension of any conviction, judgment, sentence, or order pronounced by the Sheriff. This right has been taken away by the 1926 Act.⁴ The result is that appeal in Sheriff and jury cases is regulated by the same rules as obtain in High Court cases. The new Act, therefore, gives a uniform right of appeal in all cases falling under Solemn Procedure. Advocation is not abolished.⁵

Retrospective Effect.—The 1926 Act applied to all persons convicted after 31st October 1926, and did not affect the rights as regards appeal of any person convicted on or before that date.⁶ The Criminal Appeal (Scotland) Act, 1927,⁷ made it possible to refer cases of persons convicted on or before that date.

Grounds on which an Appeal may be taken.—A convicted person may appeal against his conviction on any ground of appeal which involves a question of law alone.⁸ He may appeal with the leave of the Court or upon the certificate of the judge who presided at the trial that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact, or any other ground which appears to the Court or to the judge to be a sufficient ground of appeal.⁹

¹ 16 & 17 Geo. V. c. 15.

² 1926 Act, § 12.

³ *Ibid.* § 17 (1).

⁴ *Ibid.* § 13.

⁵ P. 223, *infra*.

⁶ § 19 (2).

⁷ 17 & 18 Geo. V. c. 26.

⁸ 1926 Act, § 1 (a).

⁹ § 1 (b).

Illustration.—Where an application for leave to appeal against a conviction and sentence was made on the ground that the conviction was based on perjured evidence, it was held that the applicant must aver special circumstances pointing to perjury, a mere general statement that false evidence had been given being insufficient.¹

Lastly, he may appeal with leave of the High Court against the sentence, unless the sentence is one fixed by law. But in the case of an appeal against a sentence of preventive detention within the meaning of the Prevention of Crime Act, 1908, it is unnecessary to obtain the High Court's leave. Otherwise, appeals against sentences of preventive detention fall under the ordinary procedure of the Act, and the provision of the Prevention of Crime Act, 1908, with regard to appeals under it is repealed.²

Procedure in taking Appeals.—It is provided in the first place³ that any documents, productions, or other things lodged in connexion with the proceedings on the trial of any person on Indictment, who, if convicted, is entitled or may be authorised to appeal under this Act, shall be kept in the custody of the Court of trial in accordance with rules made by Act of Adjournal for the purpose, for such time as may be provided by the rules, and subject to such power as may be given by the rules for the conditional release of any such documents, productions, or things from that custody.⁴

It is further provided that the Clerk of Justiciary shall furnish the necessary forms and instructions in relation to notices of appeal or notices of application under this Act to any person who demands the same, and to officers of Courts, governors of prisons, and such other officers or persons as he thinks fit, and the governor of a prison shall cause those forms and instructions to be placed at the disposal of prisoners desiring to appeal or to make any application under this Act, and shall cause any such notice given by a prisoner in his custody to be forwarded on behalf of the prisoner to the Clerk of Justiciary.⁵

An appeal, or application for leave to appeal, may be abandoned at any time.⁶

Time for Appealing and Mode of Appealing.—Where a person convicted desires to appeal to the Court or to obtain the leave of the Court to appeal, he must, within ten days of the date of his conviction in the case of appeal or application for leave to appeal against conviction, or within ten days of the date of his sentence in the case of appeal or application for leave to appeal against sentence, give notice of appeal or of application for leave to appeal.⁷ The

¹ *Macmillan v. H.M. Advocate*, 1927, J.C. 62.

² § 12 (4).

³ § 10 (2).

⁴ The Act of Adjournal, 27th October

1926, para. 6, lays down the necessary rules. See p. 370, *infra*.

⁵ § 10 (3).

⁶ Act of Adjournal, para. 13 (a).

⁷ § 4.

Act of Adjournal prescribes¹ the forms requisite for notes of appeal and applications for leave to appeal.

Except in the case of a conviction involving sentence of death, the time within which an appeal or application for leave to appeal must be made, may be extended by the Court.² This power of extension may be exercised by a single judge, subject to the accused's right of appeal to the whole Court.³ Special provision is made with regard to cases involving a sentence of death and corporal punishment, to prevent the execution of the sentence prior to the expiry of the time allowed for appeal.⁴

Rights of Accused Person to have his Interests protected pending Appeal.—The Act of Adjournal provides⁵ that where upon conviction on Indictment of any person of any offence, any disqualification, forfeiture, or disability attaches to such person by reason of such conviction, such disqualification, forfeiture, or disability shall not attach for a period of ten days from the date of the verdict nor in the event of a Note of Appeal or of application for leave to appeal being lodged, until the determination thereof. A similar provision is made in regard to the accused's property.

Bail.⁶—(1) The Court may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal.

(2) An appellant who is admitted to bail shall, unless the Court otherwise directs, appear personally in Court on the day or days fixed for the hearing of his appeal or application for leave to appeal. In the event of the appellant failing so to appear, the Court may decline to consider the appeal or application, and may dismiss it summarily or may consider and determine it or make such other order as they think fit.

(3) An appellant who is not admitted to bail shall, pending the determination of his appeal, be treated in such manner as may be directed by rules made under the Prisons (Scotland) Act, 1877.⁷

(4) The time during which an appellant, pending the determination of his appeal, is admitted to bail, and subject to any directions which the Court may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under this section, shall not count as part of any term of imprisonment or penal servitude under his sentence, and, in the case of an appeal under this Act, any imprisonment or penal servitude under the sentence of the appellant, whether it is the sentence passed by the Court of trial or the sentence passed by the Court on appeal shall, subject to any directions which may be given by the Court

¹ Para. 2, and Forms I.-VI. P. 367,
infra.

² § 4 (1) and Act of Adjournal, para. 2.

³ § 14.

⁴ § 4 (3).

⁵ Para. 7.

⁶ § 9.

⁷ 40 & 41 Vict. c. 53.

as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into prison under the sentence.

(5) Provision shall be made by rules under the Prisons (Scotland) Act, 1877, for the manner in which an appellant, when in custody, is to be brought to any place at which he is entitled to be present for the purposes of this Act, or to any place to which the Court or any judge thereof may order him to be taken for the purpose of any proceedings of the Court, and for the manner in which he is to be kept in custody while absent from prison for the purpose; and an appellant whilst in custody in accordance with those rules shall be deemed to be in legal custody.

Hearing of the Appeal.—The appellant may, if he wishes, present a written case.¹ If he chooses this course, he must intimate to the Clerk of Justiciary four days before the date fixed for the hearing.² Unless the Court otherwise direct, the respondent makes his reply orally in the ordinary way.

An appellant, notwithstanding that he is in custody, is entitled to be present if he desires it, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone, but, in that case and on an application for leave to appeal and on any proceedings preliminary or incidental to an appeal, is not entitled to be present, except where it is provided by the Act of Adjournal that he shall have the right to be present, or where the Court gives him leave to be present.³

The judge who presided at the trial must furnish his notes of the proceedings. He must also put before the Appeal Court a report giving his opinion on the case or on any point arising therein.⁴ The presiding judge may, in any case in which he considers it desirable to do so, inform the person convicted before or sentenced by him that the case is, in his opinion, one fit for appeal, and may give a certificate to that effect.⁵

The evidence in appealable trials is taken down in shorthand, and a transcript may be made for the use of the Court. The accused and any party interested may obtain copies.⁶ The term “party interested” is defined by the Act of Adjournal.⁷

Supplemental Powers of the Court at the Hearing of Appeal.⁸—The Court may, if they think it necessary or expedient, in the interest of justice—

¹ § 4.

² Act of Adjournal, 12 (a).

³ § 7, Act of Adjournal, paras. 14 and 17.

⁴ § 5, Act of Adjournal, para. 4 (a).

⁵ Act of Adjournal, para. 4 (b).

⁶ § 11.

⁷ Act of Adjournal, para. 3 (a).

⁸ § 6.

- (a) order the production of any document, or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case ; and
 - (b) if they think fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by Act of Adjournal ¹ before any judge of the Court or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court ; and
 - (c) if they think fit, receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such an application ; and
 - (d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the Court conveniently be conducted before the Court, order the reference of the question in manner provided by Act of Adjournal ² for inquiry and report to a special commissioner appointed by the Court, and act upon the report of any such commissioner so far as they think fit to adopt it ; and
 - (e) appoint any person with special expert knowledge to act as assessor to the Court in any case where it appears to the Court that such special knowledge is required for the proper determination of the case ;
- and exercise in relation to the proceedings under this Act any other powers vested in the Court, and issue any warrants necessary for enforcing the orders or sentences of the Court : Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial.

Determination of Appeals by the Court.—The Act appears to contemplate three varieties of appeals, and the powers of the Court vary with each class.

Determination of Appeals in Ordinary Cases.²—(1) The Court on any appeal against conviction shall allow the appeal, if they think

¹ Para. 15.

² § 2.

that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported, having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal : Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

Illustration.—Certain accused convicted of assault appealed on the ground that the verdict was unreasonable, in respect (1) that the evidence adduced by the Crown was not only insufficient but self-contradictory and unreliable, and (2) that the jury had not given due weight to the evidence adduced by each of the accused to prove an alibi. The Court dismissed the appeal. It was observed that the Court of Criminal Appeal is not a Court of review in the sense in which that term is used in civil procedure ; it cannot upset a verdict merely because it disagrees with the view either of the evidence or of the credibility of the witnesses on which it proceeded ; it cannot interfere unless it thinks the verdict unreasonable. The test of unreasonableness is similar to that applied to verdicts obtained in civil jury trials, viz., was the verdict so flagrantly wrong that no reasonable jury acting honestly under proper direction could have given it ? ¹

(2) Subject to the special provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction.

(3) On any appeal against conviction the Court shall have the like power to quash the sentence passed and to pass another sentence as is conferred on the Court by the immediately succeeding subsection of this section in the case of an appeal against sentence.

(4) On any appeal against sentence the Court shall, if they think that a different sentence should have been passed, quash the sentence passed and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal.

Powers of Court in Special Cases.²—(1) If it appears to the Court that an appellant though not properly convicted on some charge or part of the Indictment, has been properly convicted on some other charge or part of the Indictment, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found

¹ *Webb v. H.M. Advocate*, 1927, S.C. 92.

² § 3.

by the jury a verdict of guilty on such other charge or part of the Indictment, and may either affirm the sentence passed on the appellant at the trial or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict so substituted.

(2) Where an appellant has been convicted of an offence and the jury could on the Indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence.

(3) If on any appeal it appears to the Court that the appellant committed the act charged against him but that he was insane at the time of committing the same, the Court may substitute for the verdict found by the jury a verdict of acquittal on the ground of insanity, and may quash the sentence passed at the trial and make such order for the detention of the appellant until His Majesty's pleasure be known, as may be made under § 88 of the Lunacy (Scotland) Act, 1857,¹ in the case of a person acquitted by a jury on the ground of insanity.

Frivolous Appeals.²—If on any notice of appeal against a conviction purporting to be on a ground of appeal which involves a question of law alone it appears to the Court that the appeal is frivolous or vexatious, and that it can be determined without adjourning it for a full hearing, they may dismiss the appeal summarily, without calling on any persons to attend the hearing or to appear for the Crown thereon.

Prerogative of Mercy.³—The Act does not affect the prerogative of mercy, and the Secretary for Scotland on the consideration of any Petition for the exercise of His Majesty's mercy, having reference to the conviction of a person on Indictment or to the sentence (other than sentence of death) passed on a person who has been so convicted, may, if he thinks fit, at any time, and whether an appeal or an application for leave to appeal against such conviction or sentence has or has not previously been heard and determined by the Court, either—

(a) refer the whole case to the Court, and the case shall then be heard and determined by the Court as in the case of an appeal under this Act ; or

¹ 20 & 21 Vict. c. 71.

² § 10 (a).

³ § 16.

- (b) if he desires the assistance of the Court on any point arising in the case with a view to the determination of the Petition, refer that point to the Court for their opinion thereon, and the Court shall consider the point so referred and furnish the Secretary for Scotland with their opinion thereon accordingly.

Expenses.—The question of expenses is dealt with in § 8.

Act of Adjournal.—In pursuance of the powers conferred on it by the Act, and particularly by § 15, the High Court passed an Act of Adjournal, dated 27th October 1926, to regulate procedure under the Act. This Act of Adjournal deals very fully with the various steps of procedure. In view of its importance it has been printed in the Appendix,¹ and a careful study of it is necessary in order to ensure the proper carrying out of the provisions of the Act itself. Special attention is called to the Forms annexed to the Act of Adjournal.

¹ P. 366 *et seq.*

CHAPTER IX

HABITUAL CRIMINALITY

THE Prevention of Crime Act, 1908,¹ makes provision with regard to habitual criminals. The procedure laid down is peculiar to the Act and calls for some explanation. The procedure is confined to cases tried on Indictment.

Habitual Criminality.—This may be described as a type of statutory “crime.” Where an accused is convicted on Indictment of a crime, and subsequently admits, or is found by the jury to be, a habitual criminal, and the Court is of opinion that by reason of his criminal habits and mode of life, it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, the Court may, in addition to the sentence of penal servitude which it is bound to inflict in respect of the specific crime charged, pass a further sentence of preventive detention.² This further period comes into operation on the expiry of the original period of penal servitude, and must not exceed ten, or be less than five, years.³

No one shall be found to be a habitual criminal unless the jury finds on evidence (1) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged, been convicted of a crime and that he is leading persistently a dishonest or criminal life; or (2) that he has on a previous conviction been found to be a habitual criminal and sentenced to preventive detention.⁴ In the first of these two alternatives it is essential that the evidence establish that the accused was “leading persistently a dishonest or criminal life.”⁵ But in the second alternative, where the jury finds on evidence that the accused has on a previous occasion been found to be a habitual criminal, they must convict him and they cannot take into consideration whether since that sentence he has or has not been leading persistently a dishonest or criminal life.⁶ Previous convictions are sufficiently proved by the production of extracts

¹ 8 Edw. VII. c. 59, Part II.

² *Ibid.* § 10 (1).

³ *Ibid.* § 13 (1).

⁴ *Ibid.* § 10 (2).

⁵ *Stirling v. H.M. Advocate*, 1911, S.C. (J.) 84; 6 Adam 451.

⁶ *M'Donald v. H.M. Advocate*, 1917,

J.C. 17; but see *R. v. Norman* [1924], 2 K.B. 315; 18 Cr. App. R. 81, where it was held to be a question of fact for the jury whether an accused is still a habitual criminal, and that he may lead evidence to show that he is not now a habitual criminal.

thereof, of which notice in the Indictment has been given and to which no objection has been taken by the accused ; the matter being regulated by § 66 of the 1887 Act. But § 67 of that Act does not apply, and consequently such convictions are not sufficiently proved by their enumeration in a schedule of previous convictions attached to an extract conviction so produced.¹ Special care must be taken in regard to proof of the accused's age.²

Procedure.—It is sufficient to state in the Indictment, after setting forth the crime charged in the usual way, that the offender is a habitual criminal. Where the accused pleads not guilty, the jury are sworn and the accused is tried on the substantive crime charged. If he is found guilty of that crime, the jury are resworn—unless, of course, the accused admits that he is a habitual criminal—to inquire whether the accused is a habitual criminal. The inquiry is one continuous inquiry and no interlocutor or adjournment is required.³ Where at the first diet the accused pleads guilty of the crime, but not as to habitual criminality, the jury at the second diet confines itself to the latter question.⁴ The proper form of verdict has been considered by the High Court.⁵

Section 31 of the 1887 Act does not apply unless the accused intimates a plea of guilty of the crime charged and also admits habitual criminality. In that case the Sheriff must remit the accused to the High Court for sentence.⁶ Where a plea is tendered under § 31, it is only in very exceptional cases that the Court will allow it to be withdrawn.⁷

Appeal.—The Prevention of Crime Act set up a Court of Appeal consisting of not less than three judges of the High Court of Justiciary with jurisdiction to deal with appeals against sentences of preventive detention.⁸ In considering such appeals it is the duty of the Court to consider the case on its merits, and not merely to consider whether there was evidence upon which the jury could reasonably return the verdict appealed against.⁹ It is within the power of Court of Appeal to take additional evidence and to review the verdict in the light of that evidence.¹⁰

¹ *H.M. Adv. v. Gillan*, 1910, S.C. (J.), 49 ; 6 Adam 205 ; *H.M. Adv. v. Lavelle*, 1909, 6 Adam 103 ; 2 S.L.T. 301 ; *H.M. Adv. v. Bonnar*, 1909, 6 Adam 109, 2 S.L.T. 304.

² *M'Court v. H.M. Adv.*, 1913, S.C. (J.) 6 ; 7 Adam 9.

³ *H.M. Adv. v. Gillan*, *supra*.

⁴ § 17 (3).

⁵ *H.M. Adv. v. Gillan*, *supra*.

⁶ § 17 (3).

⁷ *Paul v. H.M. Advocate*, 1914, S.C. (J.) 69 ; 7 Adam 343.

⁸ § 17 (5).

⁹ *Heron v. H.M. Advocate*, 1914, S.C. (J.) 7 ; 7 Adam 246.

¹⁰ *H.M. Adv. v. Gillan*, *supra*.

PART II

SUMMARY CRIMINAL PROCEDURE



SYNOPSIS OF PROCEDURE

TABLE I.—ACCUSED CITED

BRANCH I.—CASE PROCEEDING TO TRIAL

1926.

- Monday, June 7. Complaint prepared (§§ 18, 19).
Act sufficient warrant for citation to any ordinary sitting of Court or to any special diet fixed by Court (§§ 20, 21, sched. D.).
- Tuesday, „ 8. Complaint served (§§ 21, 25).
Induciae at least forty-eight hours, unless in special circumstances the Court fix a shorter induciæ (§ 21).
There should be annexed to the copy of complaint served a note in terms of sched. D., intimating whether first diet merely for pleading or a diet for trial.
- Monday, „ 14. First diet (§ 29).
Any objections to relevancy, etc., should be now stated (§ 29).
Objections may be met by amendment of complaint if character of offence not altered (§ 30).
Plea of not guilty tendered (§ 32).
Case adjourned to 18th for trial (§ 32).
(a) Minute of adjournment must be signed by judge or Clerk (§ 16).
(b) Court may order accused to attend adjourned diet under a penalty (§ 32 (5)).
Such an order will seldom be necessary.
If defence *alibi*, notice should now be given to prosecutor (§ 35).
- Tuesday, „ 15. Witnesses cited (§ 21).
Although no fixed induciæ for citation of witnesses, they should receive, if possible, at least forty-eight hours' notice.
- Friday, „ 18. Trial (§ 32).
Evidence for prosecution and defence led.
In special circumstances, evidence for defence may be led prior to that for prosecution (§ 32 (8)).

1926.

Friday, June 18. See § 38 as to evidence of official documents, and § 39 as to admissions by parties.

Finding and sentence (§ 53).

Prior to sentence, judge or Clerk of Court will ask accused if he admits previous convictions libelled, and, if so, fact will be recorded (§ 34 (2)).

It is unnecessary to produce extracts of convictions admitted (§ 34 (3)).

Proof of any conviction not admitted may be led either at the diet of trial or at any adjourned diet (§ 34 (4)).

Record (§ 41) only necessary of—

(a) Plea.

(b) Documentary evidence produced.

(c) Conviction and sentence or other finding of Court.

(d) Objections to competency or relevancy of complaint or proceedings, or competency or admissibility of evidence (if either party desires that a note of such objections be taken).

Conviction and sentence (§ 53).

Sentence signed by judge or Clerk authenticates findings on which it proceeds (§§ 16, 54).

Penalties may be mitigated (§ 43).

Implements, etc., forfeited (§ 44).

Time for payment (§ 45) (1914 Act, § 42).

Admonition competent (§ 46).

Imprisonment in default of payment of penalty (§ 47).

Periods of imprisonment (§ 48) (see 1914 Act, § 13).

Detention (1914 Act, §§ 12-13).

Civil diligence (§ 49).

Caution (§ 50).

Penalties payable to Clerk (§ 51).

Expenses (§ 52 and sched. G.).

Forms of conviction (§ 53).

Sentence may be modified prior to imprisonment thereon (§ 54).

Correction of errors in minutes or extracts (§ 55).

Extract (§ 56 and sched. E.).

BRANCH 2.—PLEA OF GUILTY AT FIRST DIET

Procedure same as in Br. 1 up to first diet.

Monday, June 14. First diet (§ 29).

Plea of guilty tendered (§ 31).

Plea recorded and signed by judge or Clerk of Court (§ 31).

1926.

Monday, June 14. Plea and sentence may be combined, in which case one signature is sufficient to authenticate both (§ 31).

If previous convictions libelled, judge or Clerk of Court, after intimation of plea of guilty, asks accused if he admits correctness of such convictions; if so, plea held to be plea of guilty as libelled (§ 34 (1)).

Unnecessary to produce extracts of convictions admitted (§ 34 (3)).

If any conviction denied, proof may be led at same or adjourned diet (§ 34 (4)).

Sentence pronounced at same or adjourned diet (§ 31).

Minute of adjournment must be signed.

For sentence, etc., see Br. 1.

BRANCH 3.—ACCUSED FAILING TO APPEAR

Procedure same as in Br. 1 up to first diet.

Monday, June 14. Accused fails to appear (§ 33).

The Court may—

- (1) Adjourn to another diet, of which intimation to be given to accused (§ 33 (1)).

Intimation sufficiently given either by officer or by registered letter signed by prosecutor. Production of officer's execution or of post-office receipt for registered letter sufficient evidence of intimation. Where diet continued from day to day, intimation unnecessary.

Or

- (2) Grant warrant of apprehension and forfeit any bail, etc. (§ 33 (3), (4)); or
- (3) If accused charged with statutory offence involving imposition of pecuniary penalty only in first instance, or if procedure in absence otherwise competent under statute, proceed in absence, and

- (a) Plea of guilty may with permission of Court be tendered by a law agent or other person (§ 33 (2)).

In such circumstances it is desirable to have plea signed by person tendering it.

1926.

Monday, June 14. (b) On proof that accused has been duly cited or received due intimation of diet, proof may be led in absence, and law agent may, with permission of Court, appear for and defend accused. Proof must be led unless statute permits of conviction in default.

Proof of service may be given either by oath in Court of officer or by his written execution (§ 25).

TABLE II.—ACCUSED APPREHENDED

BRANCH 1.—CASE PROCEEDING TO TRIAL

1926.

Monday, June 7. Accused apprehended (§§ 20, 23).

If offence of a minor character, and apprehension not under warrant, bail may be accepted by officers of police (§ 14).

Tuesday, „ 8. Prisoner brought before Court (§ 23).

No warrant required for this purpose where prisoner in custody or appears voluntarily (§ 23).

To allow time for inquiry or otherwise, case may be adjourned for a period not exceeding seven days without accused being asked to plead, and he may be liberated on bail or committed to prison without bail. Judge not to allow bail in case he is not competent to try (§ 24).

Plea of not guilty tendered (§ 32).

Accused entitled to an adjournment of at least forty-eight hours, and to be furnished with copy of complaint (if he desire one). Court to inform accused of his right to adjournment (§ 32 (2)).

In special circumstances requiring dispatch, adjournment may be for shorter period than forty-eight hours (§ 32 (3)).

Case adjourned to 10th inst., and accused meantime committed to prison, bail being fixed in minute of adjournment (§ 32 (4)).

Bail may be refused (§ 32 (4)).

Accused may be ordered to attend under a penalty not exceeding £10 (§ 32 (5)).

Thursday, „ 10. Trial (§ 32).

Procedure same as in Table I., Br. 1.

BRANCH 2.—PLEA OF GUILTY AT FIRST DIET

1926.

Monday, June 7. Procedure same as in Br. 1 up to this diet. Thereafter procedure as in Br. 2 of Table I.

TABLE III.—REVIEW

(§§ 60-76)

BRANCH 1.—APPEAL BY STATED CASE

Friday, June 18. Conviction and sentence.
 Fine imposed, with alternative of imprisonment.
 Fine paid.

Thursday, ,, 24. Last day for application to have case stated (§ 61).
 Period five days after 18th (§ 61).
 Sunday, 20th, not included (§ 71).
 Intimation of application to be given to respondent by Clerk of Court (§ 61).
 Fine being paid, Court fixes sum to be consigned or for which caution is to be found to meet expenses of appeal (§ 62).
 Court may dispense with consignment or caution, and person prosecuting in public interest not bound to make consignment or find caution (§ 62).
 Last day (five days after appeal) for consignment or caution, and for payment of Clerk's fees preparing case (§ 62).

Wednesday, ,, 30. Last day (five days from consignment or caution) for completion by clerk of draft case. Draft to be given to appellant or his agent, and duplicate to respondent or his agent (§ 64).
 In practice, case is frequently prepared by appellant's agent.

Friday, July 30. If parties fail by this date (one month after draft case sent to them) to adjust terms of case, these must be settled by judge against whose judgment appeal taken. The terms of case are in any event subject to approval of judge (§ 65).
 Case adjusted, signed, and sent to appellant, and proceedings transmitted to Clerk of Justiciary (§ 66).

1926.

Thursday, Aug. 5. Last day (five days after receipt of case) for appellant sending copy of case to respondent and transmitting case to Clerk of Justiciary, with certificate of intimation having been made to respondent (§ 67).

Appellant may at any time prior to lodging case with Clerk of Justiciary abandon appeal by minute written on complaint or lodged with Clerk of Inferior Court (§ 68).

On case being lodged with Clerk of Justiciary, any other mode of appeal held to be abandoned (§ 69).

It is usual to print stated case with appendix containing copy of the proceedings and any written productions to which it is desired to make special reference.

Thursday, „ 19. Case heard by High Court (§ 72).
High Court may—

- (a) Affirm, reverse, or amend determination of Inferior Court.
- (b) Substitute fine for imprisonment, reduce period of imprisonment, reduce fine.
- (c) Remit case back for amendment, and on case being amended and returned deliver judgment.
- (d) Remit case to Inferior Court with opinion thereon.
- (e) Where appeal is against acquittal, convict and sentence, or remit case back for conviction and sentence.
- (f) Award such expenses either in High or Inferior Court as they think fit.
- (g) Remit to any fit person to inquire and report in regard to facts and circumstances, and on considering such report pronounce judgment.

A conviction, judgment, etc., is not to be quashed for want of form or, where accused has had legal assistance in his defence, in respect of objections not stated in Inferior Court, or unless for incompetency, corruption, or malice, or unless High Court of opinion that accused misled as to nature of charge or prejudiced in his defence on merits, and that a miscarriage of justice has resulted. Court may amend any conviction, sentence, etc., or pronounce such other sentence as they shall judge expedient (§ 75).

BRANCH 2.—APPEAL BY STATED CASE WHEN APPELLANT IN CUSTODY

Friday, June 18. Conviction and sentence.

Imprisonment without option of fine.

Application to have case stated.

1926.

- Friday, June 18. Intimation by Clerk to respondent (§ 61).
 Court fixes sum to be consigned or for which caution is to be found to meet expenses of appeal (§ 62).
 Court may dispense with such caution or consignment (§ 62).
- Saturday, ,, 19. Consignment made or caution found and Clerk's fees for case paid (§ 63).
 Court, on application of appellant, fixes sum to be consigned or for which caution is to be found in respect of interim liberation (§ 63).
 Application must be disposed of within twenty-four hours after it is made (§ 63).
 Appellant, being dissatisfied with amount of caution fixed, appeals to High Court.
 Note of appeal to be written on complaint.
 Proceedings transmitted to Clerk of Justiciary.
- Monday, ,, 21. Parties heard in High Court.
 Sum fixed by Inferior Court reduced and case remitted back.
- Tuesday, ,, 22. Caution found for sum fixed by High Court, and liberation granted.
 Procedure thereafter similar to that under Br. 1; but (a) if appellant does not proceed with his appeal he may, under warrant of Inferior Court, be imprisoned for such period of his sentence as "at the date of his liberation remained unexpired; and (b) if he fails to attend at the hearing of his case in the High Court, and the appeal is dismissed, he may, under warrant of the High Court, be imprisoned for a like period.

BRANCH 3. —APPEAL WHERE PROSECUTOR CONSENTS TO
 CONVICTION BEING SET ASIDE

- Friday, June 18. Conviction and sentence.
 Application to have case stated (§ 61).
 Intimation thereof given by Clerk to respondent (§ 61).
 Court fixes sum to be consigned by appellant or for which caution to be found (§ 62).
- Saturday, ,, 19. Prosecutor, by minute on complaint, consents to conviction being set aside, and sends copy thereof to appellant (§ 73).
 Clerk of Court ascertains from appellant that he does not desire to be heard (§ 73).
 Transmits complaint and proceedings to Clerk of Justiciary.

1926.

Monday, June 21. Case placed before judge in chambers and conviction set aside (§ 73).

Expenses not exceeding £3. 3s. may be awarded to appellant.

Judge may refuse to set aside conviction, in which case proceedings are returned to Clerk of Inferior Court, and appeal proceeds as if marked on date of return.

This summary method of getting a conviction set aside is also applicable to appeal by suspension or otherwise.

CHAPTER I

JURISDICTION

THE distinction between Solemn and Summary Criminal Jurisdiction has been pointed out in the Introduction,¹ where the topic of jurisdiction in general was also discussed. There are, however, a number of provisions applicable to Summary Jurisdiction which form the subject of this chapter.

It must be kept in mind that all Criminal Courts in Scotland, with the exception of the High Court of Justiciary, exercise original Summary Criminal Jurisdiction. The various modes of review are considered in Chapter V.²

1. *Regulating Statutes*

The procedure in all cases of Summary Jurisdiction is regulated by the Summary Jurisdiction (Scotland) Act, 1908.³

It is provided by the 5th section of the 1908 Act that the enactments contained in the sections of the Criminal Procedure (Scotland) Act, 1887, which are set out in sched. B. to the Act, shall apply to all proceedings under the Act, except where there is anything in any section which specially applies to procedure in the High Court and in the Sheriff and Jury Court, the words "summary complaint" being substituted for the word "indictment," the words "offence punishable on summary complaint" for the word "crime," and the expression "indictable crime," respectively, and the word "Court" for the word "jury."

In addition to these two statutes, there are certain sections of the Criminal Justice Administration Act, 1914,⁴ applicable to Scottish procedure. As regards the trial of youthful offenders, certain provisions of the Children Act, 1908,⁵ must be kept in mind.

2. *Application of the Act*

The 1908 Act applies to all summary proceedings—

- (1) In respect of any offence which might prior to the passing of the Act, or which may under the provisions of that or any future Act, be tried in a summary manner.

¹ P. 2, *supra*.

⁴ 4 & 5 Geo. V. c. 58.

² P. 200, *infra*.

³ 8 Edw. VII. c. 65.

⁵ 8 Edw. VII. c. 67, p. 250, *infra*.

- (2) In respect of any offence, or the recovery of a penalty,¹ under any statute which does not exclude summary procedure.
- (3) In respect of any order *ad factum præstandum*, or other order of Court or warrant competent to a Court of Summary Criminal Jurisdiction.

The Act applies to procedure in all Courts of Summary Criminal Jurisdiction in so far as they have jurisdiction in the matters aforesaid.²

Where any statute provides for proceedings being taken under the Summary Procedure Act, 1864, the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, or under any general or local Police Act, or under any public general or local Act incorporating any section of any Act now repealed, or for appeal under the Summary Prosecutions Appeals (Scotland) Act, 1875, such proceedings or appeal are to be taken under the 1908 Act.³

Illustration.—The Dogs Act, 1871, provides (§ 2) that any Court of Summary Jurisdiction may take cognisance of a complaint that a dog is dangerous, and § 5 of the same Act defines a Court of Summary Jurisdiction as one falling under the Summary Procedure Act, 1864. It was held that a complaint under the Dogs Act was properly brought under the 1908 Act.⁴

¹ "Penalty" includes (a) a fine; (b) any sum of money which may, under the authority of any statute or order, be recoverable from any person in respect of the contravention of any statutory requirement or prohibition; (c) any sum which may, under the authority of any statute or order, be recoverable as a penalty or forfeiture, or of which a Court has power to order payment; and (d) the forfeiture of any article where such forfeiture is authorised by statute or order.

The word "penalty" retains its former statutory signification, but has been extended to include a fine at common law or by statute, and also the forfeiture of any article authorised by law. It was held in the case of *Robertson v. D. of Atholl*, 1869, 1 Coup. 348, that where an Act of Parliament declares that a person who does certain malicious acts contrary to its provisions, is liable to pay the damage thereby occasioned, under pain of imprisonment in default of payment, the amount of such damage is to be regarded as a penalty. The same principle applies under the definition of

the 1908 Act, which is also sufficiently wide to cover any sum of which a Court may order payment under § 1 (3) of the Probation of Offenders Act, 1907. For other examples of what was held to be included within the scope of the term "penalty" under the 1864 Act, the following cases may be referred to:—

Holland v. Gauchalland Coal Co., 1867, 5 Irv. 561 (Compensation under the Master and Servant Act, 1867); *Grant v. Hay*, 1888, 2 White 6 (sum due under the Winter Herding Act, 1686); *Local Authority of Selkirk v. Brodie*, 1877, 4 R. (J.) 21; 3 Coup. 400; *Lee v. Lasswade Local Authority*, 1883, 11 R. (J.) 1; 5 Coup. 529; *Torrance v. Miller*, 1892, 19 R. (J.) 85; 3 White 254; *Suburban District Committee of County Council of Midlothian v. Maitland*, 1894, 21 R. (J.) 11; 1 Adam 325 (Public Health Acts); for a decision since the 1908 Act was passed see *Glasgow Goldsmiths Co. v. Mackenzie & Co.*, 1912, S.C. 992 (Plate (Scotland) Act, 1836).

² 1908 Act, § 4.

³ *Ibid.*

⁴ *Walker v. Brander*, 1920, J.C. 20.

Notwithstanding any special provisions to the contrary contained in any of the statutes relating to His Majesty's revenue under the control of the Commissioners of Inland Revenue or the Commissioners of Customs, the 1908 Act applies to all summary proceedings under or by virtue of any of these statutes. In such proceedings it is lawful to grant decree for the condemnation of goods seized as forfeited under the provisions of the Acts. Prosecutions under the Revenue Acts, without prejudice to any appeal competent under the 1908 Act, continue to be subject to appeal to quarter sessions, and to the Court of Exchequer in Scotland. Where the sum adjudged by conviction under or by virtue of any of the said statutes to be paid exceeds £50, the period of imprisonment imposed in respect of the non-payment of such sum may exceed three months but not six months.¹

Nothing in the Act extends or can be construed to extend to any warrant or order for the removal of any poor person who is or shall become chargeable to any parish or district, nor to any information or complaint or other proceeding under or by virtue of any statutory provision for the recovery of any rate, tax, or impost whatsoever.²

3. *Reservation of Civil Proceedings*

Nothing contained in the Act affects any right to sue for any penalty, or to apply for any order of Court or other warrant *ad factum præstandum*, in the Court of Session or Sheriff Court, but it is not competent to sue for penalties in the Small Debt Court.³ Indeed, where questions of civil right arise which cannot be suitably determined in a Court of Summary Jurisdiction a complaint may be dismissed.⁴

It is sometimes advantageous to use the forms of civil process in cases where any sort of declarator is required, or where a daily penalty is being incurred.⁵

4. *Saving of Existing Jurisdiction*

The jurisdiction and powers of all Courts of Summary Criminal Jurisdiction, except in so far as the same may be altered or modified by the 1908 Act or any future Act, remain as at the commencement of the Act.⁶

¹ 1908 Act, § 4.

² *Ibid.*

³ *Ibid.* § 6.

⁴ *Meiklejohn v. Commissioners of Harbour of Fishermay, 1902, 4 F. (J.)*

41; 3 Adam 556; *Morrison v. Anderson*, 1913, S.C. (J.) 114; 7 Adam 201.

⁵ *Gemmell v. Ford*, 1887, 1 White 437.

⁶ 1908 Act, § 7

5. *Boundaries of Jurisdiction*

The statutory provisions as to the extension of jurisdiction permitted in certain cases were explained in the Introduction. It will be convenient, however, to repeat them here :—

- (1) Where an offence is committed in any harbour, river, arm of the sea, or other water (tidal or other) which runs between or forms the boundary of the jurisdiction of two or more Courts, such offence may be tried by any one of such Courts.
- (2) Where an offence is committed on the boundary of the jurisdiction of two or more Courts, or within the distance of five hundred yards of any such boundary, or partly within the jurisdiction of one Court and partly within the jurisdiction of another Court or Courts, such offence may be tried by any one of such Courts.
- (3) Where an offence is committed on any person, or in respect of any property in or upon any carriage, cart, or vehicle whatsoever employed in a journey by road or railway, or on board any vessel whatsoever employed in a river, lake, canal, or inland navigation, such offence may be tried by any Court through whose jurisdiction such carriage, cart, vehicle, or vessel passed in the course of the journey or voyage during which the offence was committed. Where the side, bank, centre, or other part of the road, railway, river, lake, canal, or inland navigation along which the carriage, cart, vehicle, or vessel passed in the course of such journey or voyage, is the boundary of the jurisdiction of two or more Courts, such offence may be tried by any one of such Courts.
- (4) Where several offences, which if committed in one county could be tried under one complaint, are alleged to have been committed by any person in different counties, the accused may be tried for all or any of said offences under one complaint before the Sheriff of any one of such counties.
- (5) Where an offence is thus authorised to be tried by any Court, it may be dealt with, heard, tried, determined, adjudged, and punished as if the offence had been wholly committed within the jurisdiction of such Court.¹

Illustration.—A father resident in Midlothian was arrested and detained in prison on a charge at the instance of the Procurator-Fiscal of Lanarkshire, purporting to be brought under the Summary Jurisdiction Act, of neglecting his child in Glasgow. He was subsequently tried in the Sheriff Court of the County of Lanark and was

¹ 1908 Act, § 10.

acquitted. In an action of damages the accused averred that the proceedings in the Sheriff Court of Lanarkshire were *ultra vires* in respect that the place of the alleged offence was in Midlothian and not in Lanarkshire. It was held that whether the *locus delicti* was in Midlothian or Lanarkshire, the proceedings in the Sheriff Court of Lanarkshire were not *ultra vires*.¹

6. *Considerations determining before which Summary Court a Complaint is to be brought*

This matter has already received some treatment in the Introduction, where it was pointed out that the Summary Courts in Scotland are: (1) the Sheriff Courts, (2) the Justice of the Peace Courts, and (3) the Courts established in various Royal, Parliamentary, and Police Burghs, together with the Court of the Bailie of the River Clyde. The limits of territorial jurisdiction of these various Courts have been pointed out. Assuming that the requisites of territorial jurisdiction are satisfied and there remains a choice of Courts in which the Prosecutor may bring his complaint, two main considerations must be kept in view:—

- (1) Whether there is any statutory direction defining the appropriate Court, and
- (2) The gravity of the offence in view of the powers given to the Sheriff Court and the other Inferior Courts respectively by the 1908 Act itself.

Statute directing a particular Court.—The simple and ordinary case is where a statute specifically gives jurisdiction to a particular Court or Courts. An example of this is the Street Betting Act, 1906, which says: "An offence prosecuted summarily under this Act may be tried before the Sheriff or before any magistrate of any royal, parliamentary, or police burgh."

Where, however, there is no explicit statutory direction, the case is more difficult. It was pointed out in the Introduction² that the jurisdiction of the Sheriff Court is universal, in contradistinction to the other Inferior Courts on which jurisdiction must be expressly conferred.³ It follows that jurisdiction will not be readily sustained in the case of an Inferior Court other than the Sheriff Court. It has, however, been held that where an act imposed penalties on an offender who should be convicted before "a Court of Summary Jurisdiction," that "a" meant "any," and that jurisdiction was expressly conferred on the Police Court.⁴ But where the phrase used in the

¹ *Rae v. Strathern*, 1924, S.C. 147.

v. Boyd, 1907, S.C. (J.) 42; ⁵ *Adam* 247.

² P. 10, *supra*.

P. 10, *supra*.

³ *Clark and Bendall v. Stuart*, 1886, 13 R. (J.) 86; *1 White* 191; *M'Pherson*

⁴ *Hall v. Macpherson*, 1913, S.C. (J.) 100; ⁷ *Adam* 173.

statute is simply that a person shall be liable "on summary conviction," and there is no reference to a particular Court, there is nothing to oust the universal jurisdiction of the Sheriff Court.¹ Occasionally, however, jurisdiction may be conferred on one of the other Inferior Courts by implication.²

Powers of Courts other than the Sheriff Court.—The criminal jurisdiction of these Courts at common law is confined to petty offences and is, in fact, limited by the restrictions put on their power of sentence; while their statutory powers are limited by the Act conferring jurisdiction. The statutory powers conferred on the various Police Courts must be sought in the various Acts setting them up. In considering whether a complaint should be brought before one of these Courts there are, therefore, two points to remember, first the Police or other Statute regulating the Court itself and, second, the actual Statute contravened which may itself define the proper Court charging a statutory contravention.

It is provided by the 7th section of the 1908 Act that the Justice of Peace Court and Justices of the Peace, and also any judge of police or burgh magistrate shall, without prejudice to any other or wider powers conferred by statute, be entitled to exercise within their respective jurisdictions power on convicting of a common law offence—

- (1) To award imprisonment with or without hard labour for any period not exceeding sixty days.
- (2) To impose a fine not exceeding £10.
- (3) To ordain the accused (in lieu of or in addition to the said imprisonment or fine) to find caution for good behaviour for any period not exceeding six months and to an amount not exceeding £20.
- (4) Failing payment of the said fine, or on failure to find the said caution, to award imprisonment according to the scale prescribed by the Act; provided always that in no case shall the total imprisonment exceed sixty days.

These powers are practically the same as those conferred by the Burgh Police (Scotland) Act, 1892, §§ 487-490.

It will be observed that under this section the powers of sentence of the Justice of the Peace Court and Police Court are made the same. This section deals only with common law offences, and does not affect any wider powers possessed by magistrates in dealing with statutory offences. Where prior to the passing of the Act any local Police Act conferred more extensive powers of sentence in common law offences, these powers are not affected.

¹ *M'Pherson v. Boyd, supra.*

² *M'Tavish v. Neilson*, 1903, 6 F. (J.) 6; 4 Adam 303.

A further limitation of the powers of the Inferior Courts (other than the Sheriff Court) is contained in § 8 of the 1908 Act, which provides that a Court of Summary Criminal Jurisdiction (other than the Sheriff Court) shall not have jurisdiction to try, or to pronounce sentence in, but shall, to the extent and in the manner in the next succeeding section mentioned, be entitled to take cognisance of the case of any person found within the jurisdiction of such Court, and brought before such Court accused or suspected of having committed at any place beyond the jurisdiction of such Court any offence, or the case of any person brought before such Court accused of, or suspected of, having committed within the jurisdiction thereof any of the following offences :—

- (1) Murder, culpable homicide, robbery, rape, wilful fire-raising, or attempt at wilful fire-raising.
- (2) Stouthrief, theft by housebreaking, or housebreaking with intent to steal.
- (3) Theft, or reset of theft, to an amount exceeding £10 ; or theft, or reset of theft, aggravated by two previous convictions of any offence inferring dishonest appropriation of property ; or theft by opening lockfast places.
- (4) Falsehood, fraud, and wilful imposition to an amount exceeding £10 ; or falsehood, fraud, and wilful imposition aggravated by two previous convictions of any offence inferring dishonest appropriation of property.
- (5) Breach of trust and embezzlement, to an amount exceeding £10 ; or breach of trust and embezzlement aggravated by two previous convictions of any offence inferring dishonest appropriation of property.
- (6) Assault whereby any limb has been fractured, or assault with intent to ravish, or assault to the danger of life, or assault by stabbing.
- (7) Uttering forged documents or uttering forged bank or banker's notes, or offences under the Acts relating to coinage.

It is not to be deemed a conviction within the meaning of the section if the accused had been dismissed with an admonition or placed on probation without any sentence having been subsequently pronounced.¹ The meaning of this section is that, apart from any question of the restricted powers of punishment possessed by the Inferior Courts other than the Sheriff Court, there is a definite prohibition of jurisdiction in regard to the crimes enumerated. The result is that these Courts can take cognisance of these crimes only to the extent of remitting to the Sheriff Court in terms of § 9.

The Act does not in any way extend the existing powers of Summary Courts other than those of the Sheriff, and it must be kept

¹ 1908 Act, § 8.

in view that, although certain offences are specified in § 8 which cannot be tried or otherwise dealt with in such Courts, this does not inferentially confer any right on such Courts to try offences not specially mentioned, and which, from their nature, are inappropriate for trial in a Court other than that of the Sheriff. The definition of "offence" as including attempt has also to be kept in view: thus, attempted theft by housebreaking could not competently be tried in a Police Court.

Power to remit to a higher Court.—If either in the preliminary investigation or in the course of the trial it appears that the offence charged is one which cannot competently be tried in the Court, or is one which, in the opinion of the Court, owing to the circumstances of the case, should be dealt with by a higher Court, the Court may commit the accused to prison for examination for any period not exceeding four days. The prosecutor must forthwith give notice of such committal to the Procurator-Fiscal of the county within which such offence was committed, or to such other official as may be entitled to take cognisance thereof, in order that the accused may be dealt with according to law.¹ It is important to ensure that the remit is properly made and to a competent jurisdiction.²

These provisions are similar to those contained in § 459 of the Burgh Police (Scotland) Act, 1892, and are now applied in all Summary Courts, except that of the Sheriff.

Powers of Sheriff Court.—The Sheriff has a concurrent jurisdiction with every other Court within his sheriffdom in regard to all offences competent for trial in such Courts.³ The effect of this provision is that the whole statutory powers and qualifications inherent in the other Court are communicated in their entirety to the Sheriff.⁴

Illustration.—The accused was charged on a summary complaint in the Sheriff Court with a contravention of the Finance Act, 1910, by selling intoxicating liquor without a licence. The sale of the liquor was spoken to by one witness only. It was held that in virtue of § 11 of the 1908 Act the Sheriff had conferred upon him the statutory right, given to Justices of the Peace by § 65 of the Excise Management Act, 1827, to convict of such an offence upon the evidence of one credible witness.⁵

It will be noted that under a concurrent jurisdiction a case may be tried in either of the Courts which possess it, according as it has

¹ 1908 Act, § 9.

² *O'Donnell v. MacKenna*, 1910, S.C. (J.) 68; 6 Adam 242.

³ 1908 Act, § 11.

⁴ *Lawrence v. Ames*, 1921, J.C. 87, per L.J.G. Clyde.

⁵ *Lawrence v. Ames*, *supra*.

in the first instance been brought before or taken up by such Court. The case, of course, cannot be tried twice.¹

The Sheriff, without prejudice to any other or wider powers conferred by statute, has power on summarily convicting any person of a common law offence—

- (1) To impose a fine not exceeding £25.
- (2) To ordain the accused to find caution for good behaviour for any period not exceeding twelve months and to an amount not exceeding £25, said caution being either in lieu of or in addition to a fine, or in addition to imprisonment as after mentioned.
- (3) Failing payment of said fine, or on failure to find said caution, to award imprisonment as prescribed in § 48 of the Act.²
- (4) To award imprisonment, with or without hard labour, for any period not exceeding three months.³

This section extends the powers of the Sheriff beyond those conferred by 9 Geo. IV. c. 29, § 19, and the 1881 Act, § 6. Under these statutes his powers were limited to imprisonment for sixty days, a fine of £10, or caution for six months to the extent of £20. The principle laid down in the case of *Fairbairn v. Drummond*⁴ applies to the extended scale, so that the total imprisonment which may follow upon a judgment under § 11 must not exceed three months. Care must therefore be taken, in combining caution with fine or imprisonment, to avoid imposing a *cumulo* period exceeding three months.

The Sheriff, however, under the following conditions, has a greater power of summary punishment :—

- (1) Where a person is charged with any offence inferring dishonest appropriation of property, or attempt thereat, aggravated by at least two previous convictions of any such offence ;
or
- (2) Where a person is charged with any offence inferring personal violence aggravated by at least two previous convictions of any such offence,—

he may, on summary conviction by the Sheriff, without prejudice to any wider powers conferred by statute, be sentenced to imprisonment for any period not exceeding six months, with or without hard labour.⁵

Any offence described in any statute as a “misdemeanour” or a “crime and offence” may be tried in the Sheriff Court either by indictment or summarily. If tried summarily, the imprisonment

¹ *Cameron v. Macniven*, 1894, 21 R. (J.) 31 ; 1 White 346.

² P. 234, *infra*.

³ 1908 Act, § 11.

⁴ 1836, 1 Swin. 85.

⁵ 1908 Act, § 12.

competent on conviction, without prejudice to any wider powers conferred by statute, must not exceed three months.¹

This provision was inserted to meet difficulties in practice caused by Acts of Parliament, framed according to English procedure, and couched in English legal phraseology, being applied to Scotland without proper adaptation.

It has to be kept in view that where counties are combined under the Sheriff Courts (Scotland) Act, 1870,² the combined counties are for judicial purposes treated as one sheriffdom, and it is competent to try in one county an offence committed in another county of the combined sheriffdom.³

¹ 1908 Act, § 13. See *Whellans v. Hilson*, 1910, S.C. (J.) 1; 6 Adam 129.

² 33 & 34 Vict. c. 86, § 12.

³ *Kelso District Committee v. Fair-*

bairn, 1891, 3 White 94, following *Tait v. Johnston*, 1891, 18 R. 606. See also *Hendry v. Brims*, 1889, 2 White 380, as to jurisdiction of Summary Courts within county.

CHAPTER II

PROCEDURE PRIOR TO TRIAL

1. *Preliminary Investigation*

THERE is an important distinction between Solemn and Summary Criminal Jurisdiction which strikes one at the outset. In Summary Procedure there is no petition for warrant to apprehend, and no judicial examination and committal. An accused person is occasionally tried on summary complaint after he has been examined and committed, but this happens only where it was originally intended that such person should be tried upon Indictment, and subsequent investigation has shown that the case can be disposed of summarily. This power is reserved by § 77 (4) of the 1908 Act, but it is seldom employed, in view of the provision for an adjournment before pleading conferred by § 24.

The absence of a preliminary Petition materially affects the procedure. It necessitates fuller information before proceedings are begun, because the prosecutor knows that he has to go to trial upon the charge as stated in his complaint. It also calls for careful study of the points suggested for consideration in the Introduction,¹ because the facility and rapidity of summary process may readily lead to hasty prosecution and careless drafting. No one unfamiliar with Summary Procedure should attempt to prepare a complaint until he has made himself acquainted with the matters discussed in the Introduction and the preceding chapter.

It is sometimes necessary to apply to the Court for an incidental warrant or order, prior to the presentation of the complaint, or even where no complaint is to follow. The forms in sched. F. may be taken as typical examples of such applications—to search premises for stolen goods, to destroy diseased meat, to restore stolen property. Sec. 17 provides for such contingencies by enacting that where, prior to the presentation of a complaint, it is necessary to apply to the Court for any warrant or order of Court as incidental to subsequent proceedings by complaint, or where the Court has power to grant any warrant or order of Court, although no subsequent procedure by complaint may follow thereon, such application may be by Petition at the instance of a prosecutor in the form, or as nearly as may be in the form, contained in sched. F. Where necessary for the execution of any such warrant or order of Court, warrant to break open lock-fast places is implied.²

¹ P. 12, *supra*.

² 1908 Act, § 17.

Although in the majority of cases the warrant craved in such a Petition will be granted as a matter of course, there may be cases where it would be proper that the Court should order that intimation of the application be given to any person interested, and afford him an opportunity of being heard, if so advised, before granting or otherwise disposing of it. In such a case the Court might order a copy of the Petition to be served on such person, with certification that, if he desired to be heard thereon, he would require to attend for that purpose on a day and at a time and place named in the order, and that failing his doing so the order would be granted. Such an order would be served in the usual way by an officer of law, unless in any special circumstances the Court prescribed some other method of service.¹

2. *Time Limit*

The time within which proceedings may be instituted is a matter which must be taken into account before preparing a summary complaint, particularly in statutory contraventions.

At Common Law.—As regards crimes at common law it is of less moment. Theoretically, there is no fixed limit within which a prosecution for these may be instituted. Hume² suggests twenty years, but in practice the question is limited by the impossibility of proving a charge after a considerable interval.

Statutory Offences.—As regards contraventions of statutes, and of orders having statutory authority, the case is different. Many statutes fix a period within which proceedings, in respect of a contravention of their provisions, must be instituted. For prosecutions under statutes which do not prescribe a time limit, a limit is fixed by the 26th section of the 1908 Act, which enacts that all proceedings under the Act in respect of the contravention of any statute or order, unless the statute or order under which the prosecution is raised fix any other period, must be commenced within six months after the contravention occurred, and in the case of a continuous contravention within six months of the last date of such contravention. It is competent in such case in any prosecution to include the entire period during which the contravention has occurred. But the scope of the section is limited to cases in which the statute under which the prosecution is brought does not fix any period within which proceedings must be raised.³ Its sole function is to provide a time limit where none is otherwise provided.⁴

¹ See *M'Lauchlin v. Renton*, 1911, S.C. (J.) 12; 6 Adam 378.

² ii. 136.

³ *MacKnight v. MacCulloch*, 1909, S.C. (J.) 29; 6 Adam 144.

⁴ *Ibid.*, per Lord Low,

Date of Commencement of Proceedings.—Proceedings are held as being commenced within the meaning of the section as of the date when a warrant to apprehend or to cite the accused is granted, provided that such warrant is executed without undue delay.¹

If a shorter time limit than six months is fixed by any statute, proceedings must be commenced within that time; but the other provisions of the section relative to a continuous offence and to what shall be deemed the commencement of proceedings are, it is thought, applicable not only to cases to which the statutory limitation fixed by the section applies, but also to cases where a shorter time limit is fixed by special statute. It is well, however, in every case where this is possible, to serve or execute a warrant well within the time limit.

If there is any doubt as to what is meant by the expression “without undue delay,” it may be said that the term implies that delay in execution was caused by the conduct of the accused person, or by circumstances which do not imply any want of activity on the part of the prosecutor.

Illustrations.—In a prosecution for a contravention of the Game Act, 1773 (13 Geo. III. c. 54), committed on 11th August 1884, the complaint and warrant of apprehension thereon were both dated 7th February 1885, but the warrant was not put in force until 9th July 1885. The Act, § 14, fixes a time limit of six months. Held that “month” meant calendar month, so that the warrant was obtained within the period of six months from the date of the offence, but that, no satisfactory explanation of the great delay in the execution of the warrant having been furnished, a conviction fell to be suspended.²

In an Indictment for a contravention of the Criminal Law Amendment Act, 1885, § 5, it was alleged that the offence was committed on numerous occasions between 1st May 1889 and 24th May 1890. The section provided a time limit of three months. Held that the charge was irrelevant in respect that it covered a period beyond the time limit.³

In a prosecution under the Prevention of Cruelty to Children Act, 1894, a complaint in which was served on 29th March 1894, the accused was charged with cruelty extending over a period from 1st August 1893 to 28th February 1894, and was convicted “of the contravention charged.” Held that, as the period between 1st August and 28th September 1893 was beyond the limitation of six months fixed by the Summary Procedure Act, a conviction fell to be suspended.⁴

¹ 1908 Act, § 26.

³ *H.M. Adv. v. Philp*, 1890, 2 White 525.

² *Farquharson v. Whyte*, 1886, 13 R. (J.) 29; 1 White 26.

⁴ *Farquharson v. Gordon*, 1894, 21 R. (J.) 52; 1 Adam 405.

The Coal Mines Act, 1914, § 2, enacts that where a report is made with regard to an accident in a mine, and it appears from the report that any of the provisions of the Coal Mines Act, 1911, or the orders or regulations made thereunder, were not being complied with at the time of the accident, summary proceedings in respect of such non-compliance may be commenced at any time within three months after the making of the report. A complaint against mineowners charging them with contraventions of the 1911 Act and relative orders was brought more than six months after the date of the last contravention, but within three months of the issuing of the report. The complaint bore to be under the Summary Jurisdiction Act, 1908, and contained no reference to the Coal Mines Act of 1914 or to the report. The Sheriff-Substitute dismissed the complaint as incompetent, in respect that it was not timeous. It was held that the complaint was competent and timeous, as it was unnecessary to libel either the 1914 Act or the report.¹

3. *Prosecutors*

At common law the right to prosecute in criminal cases is conferred on two classes of persons,² first, the Lord Advocate and the public officials under him who prosecute in the public interest; and second, any person injured or aggrieved by the criminal act of another, either by an injury caused to himself, or it may be to someone in close relationship to himself.³ These two classes are distinguished as public and private prosecutors respectively. A third class is, in some instances, created by statute, where power to prosecute is given to someone in a certain position, it being, in the view of the legislature, expedient to confer a power to prosecute which would not exist at common law.⁴ A fourth class appears to arise by implication, where a person has an interest to prosecute from being by law entitled to the whole or part of the penalty, or being a direct sufferer by the offence committed.⁵

Public Prosecutors.—In every Court an official is appointed whose duty it is to prosecute all offences competent to be dealt with by the Court. In the Sheriff Court this official is termed the Procurator-Fiscal; in the Justice of Peace Court, the Justice of Peace Fiscal; and in the Burgh and Police Courts, the Burgh Prosecutor. When the term "Procurator-Fiscal" is used without qualification, the public prosecutor of the Sheriff Court is understood.

The term "prosecutor" includes Procurator-Fiscal, Assistant

¹ *Archibald v. Plean Colliery Co.*, 1923, J.C. 80.

² Macdonald 280.

³ *Rintoul v. Scottish Insurance Commissioners*, 1913, S.C. (J.) 120, *per*

L.J.C. Macdonald at 122; 7 Adam 210. See also *per* L.J.G. Dunedin.

⁴ *Ibid.*

⁵ *Ibid.*

Procurator-Fiscal, Burgh Prosecutor, and any other persons prosecuting in the public interest, and their representatives duly authorised.¹

All penalties, for the recovery of which in Scotland no special provision has been made by statute or order, may be recovered by the public prosecutor in any Court having jurisdiction. Where any Court has power to take cognisance of offences, the penalties attached to which are not defined, the punishment for such offences is regulated by that applicable to common law offences in such Court.²

A public prosecutor is not entitled to prosecute in a Court other than that to which he is attached. Thus the Justice of Peace Fiscal was held not entitled to prosecute in the Sheriff Court.³

Private Prosecutors.—As regards crimes at common law, private prosecutions are in Scotland almost unknown; but it is competent for any person having an interest to prosecute for such a crime, if he obtains the concurrence of the public prosecutor. By “having an interest” it is meant that the prosecutor must be either directly aggrieved or injured by the crime, or be a person who has a substantial interest in the property involved in it.⁴

As regards statutory contraventions, private prosecutions are more common. Several Acts give authority to a “common informer” to prosecute. This implies that any member of the public may institute proceedings without setting forth injury suffered, danger incurred, or other substantial interest.⁵ As regards other statutes a private person having a substantial interest may prosecute, and the right of private prosecution is not confined to individuals, but may be exercised by corporate bodies.⁶ But the interest must be a substantial one. Where a Parish Council prosecuted, with the concurrence of the Procurator-Fiscal, in respect of offences against the Children Act, the Court refused to uphold its title. Lord Justice-General Strathclyde said: “If there were any patrimonial interests at stake here, the question would be totally different. But I cannot conceive any case in which a public body—whether a Government Department or a local authority—entrusted with the administration of an Act of Parliament, can be said to be aggrieved or injured by failure to observe the statutory provisions.”⁷ The question has been mooted whether the representatives of a private prosecutor who has died after instituting the prosecution are entitled to be sisted.⁸

¹ 1908 Act, § 2.

² *Ibid.* § 27.

³ *Lockhart v. Molison*, 1868, 40 S.J. 393.

⁴ P. 140, *supra*.

⁵ *Hamilton v. Girvan*, 1867, 5 Irv. 439; *Hanvy & Orr v. Stirrat*, 1869, 1 Coup. 334; *Kennedy v. Cadenhead*, 1867,

6 M. 179; 5 Irv. 539; *Munro v. Buchanan*, 1910, S.C. (J.) 47; 6 Adam 234.

⁶ *Lockwood v. Chartered Institute of Patent Agents*, 1913, S.C. (J.) 8; 7 Adam 14.

⁷ *Glasgow Parish Council v. Edward*, 1914, S.C. (J.) 159; 7 Adam 486.

⁸ See *Cathcart v. Houston*, 1915, S.C. (J.) 5; 7 Adam 535.

Concurrence of Public Prosecutor.—Complaints at the instance of private prosecutors for offences at common law, and for statutory offences where imprisonment without the option of a fine is competent, unless otherwise provided in any statute, require the concurrence of the Procurator-Fiscal, or other public prosecutor, of the Court in which they are brought.¹

This concurrence is usually given as a matter of course on presentation of a complaint regularly prepared and signed. In the event of the public prosecutor refusing to concur, application may be made to the Lord Advocate, and the High Court of Justiciary.² The Procurator-Fiscal of the Sheriff Court is entitled to a fee for his concurrence. The usual amount is 2s. 6d., the sum approved by the Commissioners on Courts of Justice in their third report in 1818.

When a complaint is instituted with the concurrence of the public prosecutor, the fact must be mentioned in the instance, by adding the words, “with the concurrence of C. D., Procurator-Fiscal of Court for the public interest.” Concurrence is given by a minute signed by the public prosecutor on the complaint in the following terms: (*Place and date*) “I concur in the foregoing complaint.—C. D., Procurator-Fiscal of Court.” This concurrence will not be given where there are special circumstances which justify refusal, such as great delay in instituting a prosecution, or any element of malice or oppression. The concurrence must be given before the complaint is served or executed. It is incompetent after the accused is brought before the Court to amend the complaint by adding a minute of concurrence.³ If an instance is bad in itself, concurrence by the Procurator-Fiscal does not cure the defect.

Illustrations.—In a prosecution at the instance of the Board of Trade, with concurrence of the Procurator-Fiscal, for a contravention of § 255 of the Merchant Shipping Act, 1854, held that the instance was bad, as the Board of Trade was not an aggrieved person within the meaning of § 531 of the Act, and that the general powers of administration contained in § 6 of the Act did not infer a title to prosecute. Further, that the instance, being bad, was not cured by the concurrence of the Procurator-Fiscal.⁴

A prosecution under § 35 of the Merchant Shipping Act, 1854, was instituted without the concurrence of the Procurator-Fiscal. On objection being taken to the instance, the Sheriff allowed the complaint to be amended by the Procurator-Fiscal adding his concurrence. Held that this was incompetent, and conviction set aside.⁵

¹ 1908 Act, § 18. See *Kennedy v. Cadenhead*, *supra*.

³ *Lundie v. MacBrayne*, 1894, 21 R. (J.) 33; 1 Adam 242.

² *Robertson v. H.M. Advocate*, 1887, 15 R. (J.) 1; 1 White 468.

⁴ *Simpson v. The Board of Trade*, 1892, 19 R. (J.) 66; 3 White 167.

⁵ *Lundie v. MacBrayne*, *supra*.

Statutory Prosecutors.—Many statutes confer upon specified officials the right to prosecute in respect of contraventions of their provisions. For example, inspectors of factories, inspectors of poor, excise officers and others are given a special title to prosecute. Sometimes a statute provides that prosecutions under it must be brought “with the consent, in writing, of the Secretary of State.” In such a case evidence of the consent is unnecessary and incompetent, the statement of the Lord Advocate or of his representative that it has been obtained being sufficient.¹ As a general rule, these statutory prosecutors are regarded as private prosecutors.

Illustration.—An official appointed by a Local Authority to put in force the provisions of the Sale of Food and Drugs Acts, and to take proceedings for offences thereunder, has been held to be a private prosecutor.² Lord Ardwall observed: “Does the complainer answer the description of a private prosecutor? He must either be a public or a private prosecutor—there are only the two classes. Now, the public prosecutors are the Lord Advocate and his deputies and the Procurators-Fiscals and their deputies, and also such persons as are specially appointed in virtue of such Acts of Parliament as the Burgh Police Acts, to prosecute in the public interest in the Burgh Courts.”

The Poor Law (Scotland) Act, 1845, § 80, enacts that a prosecution for desertion for wife or children may be at the instance of the inspector of the poor of the parish. It was held that an inspector of poor is to be regarded as a private prosecutor.³

Where, however, a right to prosecute is not merely conferred, but a specific direction to prosecute is given to some statutory body, it would appear that the official prosecuting is a public prosecutor.⁴

Illustration.—A person appointed by a School Board under § 70 of the Education (Scotland) Act, 1872, to prosecute a complaint for failure to provide elementary education is a public prosecutor.⁵

Concurrence by the Procurator-Fiscal is not required where a statute confers a right to prosecute.⁶

Prosecutors with an Implied Title.—It is not very clear what prosecutors are to be considered as falling under the other class

¹ *Stevenson v. Roger*, 1915, S.C. (J.) 24; 7 Adam 571.

² *Wilson v. M'Laughlin*, 1907, S.C. (J.) 61; 5 Adam 284.

³ *Motion v. M'Ginnes*, 1907, S.C. (J.) 105; 5 Adam 393.

⁴ *Motion v. M'Ginnes*, *supra*, per L.J.C. Macdonald.

⁵ *M'Murdo v. M'Cracken*, 1907, S.C. (J.) 1; 5 Adam 164, following *Thomson v. Scott*, 3 F. (J.) 79; 3 Adam 410. And see observations by Lord Ardwall in *Wilson v. M'Laughlin*, *supra*.

⁶ *Motion v. M'Ginnes*, *supra*, per Lord Ardwall.

mentioned by the Lord Justice-Clerk in *Rintoul*.¹ Such prosecutions have been held competent where the prosecutors were entitled to a portion of the penalties²; where the prosecutor had a clear personal interest not only because he might receive part of the penalty as informer, but also because he suffered injury³; or where a chartered body had a pecuniary interest because it was entitled to charge registration fees.⁴ But a title to prosecute is not set up by implication simply because the Act of Parliament confides to a public department or local authority the duty of administering the Act of Parliament.⁵

4. *Accused Person*

There is no specific definition of the term "accused" in the Act. It must therefore receive its ordinary meaning, as the person against whom a complaint is directed.⁶

The prosecutor, in preparing a complaint, must see that the person accused is properly named and designed. With this object, in cases investigated by the police, it is customary for an officer to see the accused person, inform him of the charge, obtain from him his correct name and designation, and note any explanation which he may wish to make. If a slight mistake is inadvertently committed in the accused's name or designation, and he appears in answer to the charge, the necessary correction can be made, in virtue of the ample power of amendment conferred by the Act; but where the mistake is of a more serious nature the safest course is (unless the accused consents to an amendment) to drop proceedings on that complaint and serve of new.

With regard to the prosecution of offences committed by a company, association, incorporation, or body of trustees, the 1908 Act provides that, without prejudice to any other or wider powers conferred by statute,—

- (1) Proceedings may be taken against such company, association, incorporation, or body of trustees in their corporate capacity, and in that event any penalty imposed shall be recovered by civil diligence in manner hereinafter provided; or

¹ *Rintoul v. Scottish Insurance Commissioners*, 1913, S.C. (J.) 120; 7 Adam 210. P. 140, *supra*. This case throws doubt on *Caledonian Railway Co. v. M'Gregor*, 1909, S.C. 1010.

² *Glasgow City and District Railway Co. v. Hutchison's Trs.*, 1884, 11 R. (J.) 43; 5 Coup. 420.

³ *Simpson v. Corporation of Glasgow*, 4 F. 611.

⁴ *Lockwood v. The Chartered Institute of Patent Agents*, 1913, S.C. (J.) 8; 7 Adam 14.

⁵ *Simpson v. The Board of Trade*, 19 R. (J.) 66; 3 White 167; *Glasgow Parish Council v. Edward*, 1914, S.C. (J.) 159; 7 Adam 486.

⁶ *Walker v. Brander*, 1920, S.C. 840.

- (2) Proceedings may be taken against an individual representative of such company, association, or incorporation as follows :—
- (a) In the case of an ordinary company or firm, any one of the partners thereof, or the manager or the person in charge or locally in charge of the affairs thereof, may be dealt with as if he was the person offending ;
 - (b) In the case of an association, incorporation, or incorporated company, the managing director or the secretary, or other principal officer thereof, or the person in charge or locally in charge of the affairs thereof, may be dealt with as if he was the person offending ;
 - (c) The offence shall be deemed to be the offence of such company, association, or incorporation, and a conviction thereof may be libelled as an aggravation of any subsequent offence of the same nature by the same company, association, or incorporation, although the individuals charged and convicted are different.¹

Illustrations.—Certain persons were charged with a breach of a Liquor Order in respect that in their capacity as office-bearers and committee of management of a registered club they did “ by the hand of A. B., barmaid in the said club,” supply exciseable liquor after the authorised hours. The charge was held competent.²

Where an unincorporated company trading under the name of “ The City and Suburban Dairies ” was charged under that name, without the addition of the names of the partners, the complaint was held competent.³

It may at first sight seem strange that a body of trustees should in their trust capacity be amenable to the jurisdiction of a Criminal Court, but when the wide scope of the Summary Jurisdiction Act is considered the explanation of this apparent anomaly will be at once seen. Under several Acts of Parliament of an administrative nature, owners of property are liable in penalties for statutory contraventions of a more or less technical nature, and as such owners may be trustees, it is necessary that there should be some form of process by which these penalties can be recovered. It will be observed, however, that the provisions under subsection (2) of this section, as to proceedings being taken against an individual representative of a company, association, or incorporation, do not apply to a body of trustees. They must be proceeded against in their corporate capacity, and any penalty imposed recovered if necessary by civil diligence against the trust estate. As regards proceedings against a company, association, or incorporation, the prosecutor has a choice :

¹ 1908 Act, § 28 ; see p. 325, *infra*.

² *City and Suburban Dairies v.*

³ *Burnette v. Mac Kenna*, 1917, J.C. 20. *Mac Kenna*, 1918, J.C. 105.

he may proceed against the accused in their corporate capacity, or he may take action against an individual representative. In the former case any penalty, if not paid, will be recoverable by civil diligence; in the latter, the person proceeded against will be liable to imprisonment in the event of non-payment of any penalty imposed. The question of the procedure which is more appropriate will depend on the circumstances of each case. Where the penalties incurred are large, it may, as a general rule, be best to proceed against the accused in their corporate capacity; in other cases, to select an individual representative and proceed against him. While in terms a wide choice seems to be given by subsections (a) and (b) of subsection (2), it will be necessary to ascertain, if possible, the person who is the responsible representative of the company, association, or incorporation. While it would, it is thought, be competent for the Court to order recovery of a penalty imposed on an individual representative by civil diligence instead of by imprisonment, such diligence would apparently only be competent against the estate of that individual. The provision in subsection (c) is important. It prevents the accused, when prosecuted in a corporate capacity through an individual representative, pleading that a conviction must be treated as personal to the individual convicted.

In construing subsection 2 (c) it has been pointed out that the subsection is confined to proceedings taken against individual representatives of a company. Accordingly, in proceedings against the individual representative of a company for an offence committed by the company it was held incompetent to libel as an aggravation of the offence a conviction previously obtained against the company in its corporate capacity.¹

The provisions for the citation of persons dealt with in a corporate capacity and for recovery of penalties by civil diligence are contained in §§ 21 and 49 of the Act.² At the proceedings in the Inferior Court in connexion with a complaint, a firm may be competently represented by its manager.³ In a High Court case, however, in proceedings for review, it was held that a firm of law agents could not be represented in that Court by one of its partners and that counsel must be employed.⁴

Master's Liability for His Servant.—A troublesome question sometimes arises in statutory charges where a contravention may be committed by a servant. In such a case, who should be charged—the master, or the servant, or both? If the offence is of a truly criminal character, each person is liable for

¹ *Campbell v. Macpherson*, 1911, S.C. (J.) 33; 6 Adam 394.

³ *M^c Alpine & Sons v. Ronaldson*, 1901, 3 F. (J.) 82; 3 Adam 405.

² P. 239, *infra*.

⁴ *Macbeth & MacLagan v. Macmillan*, 1914, S.C. (J.) 165; 7 Adam 493.

his own delict. It is therefore necessary in such a case to charge the person who is guilty of the act or omission constituting the contravention, and any other person only so far as he has been accessory.

The doctrine of vicarious responsibility holds no place in our criminal jurisprudence, but there are a number of statutes, as for example some licensing statutes, which make an innocent master liable for the delict of his servant.¹ These statutes are, however, as a rule strictly construed.

Illustration.—Under an order dealing with the control of the liquor traffic, it was made an offence for any person “by himself or by any servant or agent” to sell exciseable liquor under certain specified circumstances. It was held that “agent” fell to be construed in its ordinary legal significance and that it did not include a boy whom the licensee’s shopman was authorised to employ only as an occasional messenger and who had without authority committed the offence charged.²

A servant employed by a dairy company to sell its milk, in disobedience to its instructions, charged a higher price for the milk than the authorised maximum rate, but he did not account to his employers for the portion of the price in excess of that rate. It was held that the servant, in so far as he sold the milk at a price beyond the authorised rate, was acting outwith the scope of his employment, and that the company was not guilty of a contravention of the order fixing the maximum rate.³

Where a statutory offence is not of a truly criminal character, the procedure depends upon whether the servant, when he contravened the statute, was acting within the scope of his employment, and conducting his master’s business according to the orders he had received from his master, or was acting for his own ends. In the former case, the master is generally responsible; in the latter, he is not responsible unless collusion or trickery can be proved.⁴

5. *The Complaint : Its Form and Constituent Parts*

All proceedings under the Act for the trial of offences or recovery of penalties must be instituted by complaint in the form contained in schedule C.

All summary proceedings under the Act must be instituted by a complaint in, or as nearly as may be in, the statutory form.

The form given in schedule C., and the examples furnished in

¹ *Gair v. Brewster*, 1916, J.C. 36.

² *Auld v. Devlin*, 1918, J.C. 41.

³ *City and Suburban Dairies v. M'Kenna*, 1918, J.C. 105.

⁴ *Patrick v. Kirkhope*, 1894, 21 R. (J.) 27; 1 Adam 360; *Philip v. Lamb*, 1893,

1 Adam 4; *Linton v. Stirling*, 1893, 20 R. (J.) 71; 1 Adam 61; *Galloway v.*

Weber, 1889, 16 R. (J.) 46; 2 White 171; *Lindsay v. Dempster*, 1912, S.C. (J.) 110;

6 Adam 707; *Herriot v. Auld*, 1918, J.C. 16.

the Appendix, illustrate the subject. The general form is applicable both to common law and statutory offences, the only difference being that in the latter class the penalty imposed must be indicated.¹

The Constituent Parts: Heading.—The complaint is headed “Under the Summary Jurisdiction (Scotland) Act, 1908.” The particular Act, if the offence be a statutory one, under which the charge is brought should not be added to the heading. Nor should reference be made to any Act conferring jurisdiction on the Court to try the offence charged.²

Name of Court.—Next comes the designation of the Court and the place of its sitting.

Instance.—The instance is in the form—“The complaint of A. B., Procurator-Fiscal (or otherwise, as the case may be).” Where the concurrence of the Procurator-Fiscal is necessary, it is essential to add “with the concurrence of the Procurator-Fiscal of Court.”³ Similarly, where the consent or authority of some official such as the Home Secretary is necessary, the fact that it has been obtained must appear in the complaint.⁴ If the prosecutor is mentioned in a special capacity, that must be specified.

Charge.—This runs in the second person, beginning with the accused’s designation. If he is accused in a special capacity that must be specified. The charge is stated in the plainest terms, merely setting forth the act, attempt, or omission of which the accused is alleged to have been guilty, adding, in the case of a statutory contravention, that this was contrary to a particular section of a particular Act of Parliament. Any aggravation by previous conviction is set forth in a list annexed.

Signature.—The complaint concludes with the signature of the prosecutor. In a prosecution under the Burgh Police Act, 1892, the complaint was signed for the burgh prosecutor by an inspector of police, who had no written authority to do so, but was merely authorised to do so verbally by the presiding magistrate. It was held that the authority should have been in writing, and the conviction was suspended.⁵

Provisions in the Glasgow Police Acts as to a lieutenant of police

¹ P. 156, *infra*.

² *M'Laren v. Macleod*, 1913, S.C. 24; 7 Adam 571.
(J.) 61; 7 Adam 102.

³ P. 142, *supra*.

⁴ *Stevenson v. Roger*, 1915, S.C. (J.)

⁵ *Dunlop v. Semphill*, 1900, 2 F. (J.)
46; 3 Adam 159.

acting for the Procurator-Fiscal do not exclude the necessity for a written appointment.¹

The provisions of the Act in regard to the right of certain prosecutors to be represented by a law agent must be read in relation to the distinction between public and private prosecutors.² It would appear, however, in view of the wide terms of § 18, that the only person for whom a law agent cannot appear is the "public prosecutor of a Court," *i.e.*, the Procurator-Fiscal or burgh prosecutor. In that event the difficulties arising in some of the undernoted illustrations could be now overcome.

Illustrations.—In a prosecution for a contravention of the Lands Valuation Act, 1854, at the instance of an assessor, held that under § 9 (1) of the Summary Jurisdiction Act, 1881, a law agent could appear for a private prosecutor although the complaint was signed by that prosecutor.³

A prosecution for contravention of the Education Acts was raised at the instance of Scott, a person appointed by the School Board to prosecute, and who was also burgh prosecutor. Scott was absent at certain diets in the case, and the deputy burgh prosecutor appeared for him. It was held that this was incompetent, and that Scott had no title to appear by deputy.⁴

A person appointed by a School Board to prosecute under the Education Acts was held to be a public prosecutor, and could not appear by a law agent in terms of § 9 (1) of the Summary Jurisdiction Act, 1881.⁵

A medical officer of health prosecuting under the Food and Drugs Acts is a private prosecutor, and as such entitled, in a prosecution at his instance, to be represented by a law agent.⁶

In a prosecution for contravention of the Poor Law Act, 1845, § 80, it was held that the Inspector of Poor, being a private prosecutor, could be represented by a law agent. Lord Ardwall expressed the opinion that in such a prosecution the inspector does not require the concurrence of the Procurator-Fiscal.⁷

6. *Statement of Charge : Relevancy of the Complaint*

Common Law Offences.—In stating the charge against an accused person, it is competent to use any of the forms contained in sched. A. of the 1887 Act, so far as these are applicable to charges which may be tried summarily, or any of those contained in sched. C. of

¹ *Dewart v. Neilson*, 1900, 2 F. (J.) 57 ;
3 Adam 189.

² P. 140, *supra*.

³ *Finlayson v. Bunbury*, 1898, 2 F. (J.) 110 ; 2 Adam 478.

⁴ *Thomson v. Scott*, 3 F. (J.) 79 ;
3 Adam 410.

⁵ *M'Murdo v. M'Cracken*, 1907, S.C. (J.) 1 ; 5 Adam 164.

⁶ *Wilson v. M'Laughlin*, 1907, S.C. (J.) 61 ; 5 Adam 284.

⁷ *Motion v. M'Ginnes*, 1907, S.C. (J.) 105 ; 5 Adam 393.

the 1908 Act. No further specification is required than a specification similar to that given in these forms.¹

Illustration.—Objection to the relevancy of a complaint under the 1908 Act, charging the accused with perjury, was taken on the grounds (1) that, while the complaint set forth that on a certain day in a certain Court the accused had made certain false statements in giving evidence in a civil cause; (2) that it was not alleged in the complaint that the statements made were relevant to the issue of the cause. It was held that the fact that the complaint was in the form prescribed by the Act was a sufficient answer to the objections.²

The clauses of the 1887 Act relating to implied meanings and latitudes, alternative verdicts, and previous convictions are incorporated.³ As these were explained in Part I., it is only necessary for convenient reference to give here the heads under which they are to be found :—

- (1) Naming of accused (§ 4), p. 46.
- (2) Nomen juris (§ 5), p. 55.
- (3) Plural accused (§ 6), p. 47.
- (4) Accessories (§ 7), p. 47.
- (5) Qualifying words (§ 8), p. 55.
- (6) Quotation of statutes (§ 9), p. 58.
- (7) Time and place (§ 10), pp. 49, 52.
- (8) Quantities, persons, things, and modes (§ 11), p. 58.
- (9) Description of property (§ 12), p. 59.
- (10) Description of persons and goods (§ 13), p. 59.
- (11) Money (§ 14), p. 60.
- (12) Documents (§ 15), p. 60. As there is no list of productions annexed to a complaint, it is usual to state that the document “is produced herewith,” and to produce it at the first diet and get it marked by the Clerk of Court.
- (13) Charges of dishonesty (§ 58), p. 60.
- (14) Alternative verdicts (§§ 59-62), p. 107.
- (15) Previous convictions (§§ 63, 64, 65, and 1908 Act, § 34 (7)), p. 61.

In an indictment or complaint the words “or thereby,” “in or near,” “wickedly and feloniously,” or any of the other expressions declared by these clauses of the 1887 Act to be implied, should not be inserted.

The principles discussed in the chapter dealing with the relevancy of indictments apply equally to complaints. The safe rule in framing complaints for common law offences is strictly to adhere

¹ 1908 Act, § 19.

² 1908 Act, § 5.

³ *Strathern v. Burns*, 1921, J.C. 92.

to the statutory forms. Questions of relevancy in complaints of this type are now rare.¹

Statutory Offences.—One of the greatest benefits attained by the 1908 Act was the removal of the mass of verbiage and prolix statement with which the libelling of statutory charges was formerly encumbered. The guiding principle in libelling statutory contraventions under the Act is to state in plain language what the accused did, attempted, or omitted to do, contrary to the provisions of an Act of Parliament. Clearness and simplicity are the objects to be achieved. It must again be emphasised that strict adherence to the statutory forms, whenever they are provided, is the safe rule in charging statutory offences. The reference to the Act is held to imply that the conduct of the accused was qualified by all the circumstances required to constitute a contravention of its provisions.

It must be noted that, except in some special cases, such as arise under the Revenue and Game Acts, a person cannot be charged with two separate offences founded on the same *species facti*—that is to say, the same circumstances of time, place, and mode. In a case of doubt, two offences may be charged alternatively, but an accused person is not to be twice punished for the same misconduct.²

Use of Statutory Words.—The description of any offence in the words of the statute or order contravened, or in similar words, is sufficient.³ This provision simplifies libelling, because no question of relevancy can be raised if the words of the statute are employed. At the same time, as the accused person must always be informed of the kind of charge he is expected to meet, it is often desirable to add some specification. Opinions have frequently been expressed that although prosecutors are within their rights in following the injunctions of the statute, it is their duty in special cases to give fair notice to the accused of the precise nature of the statutory offence with which he is charged.

Illustration.—A complaint charged an accused with “driving a motor car negligently,” without specifying wherein the negligence consisted. It was held that it was relevant, being in the form prescribed by the 1908 Act, but it was observed that public prosecutors should consider the advisability of specifying the particular kind of negligence on which they rely.⁴

No complaint laid in the statutory words has as yet been dismissed as irrelevant on account of the prosecutor’s failure to give additional specification, but the Court has indicated that in special

¹ *M’Shane v. Paton*, 1922, J.C.; *White* 348; *Moore & Co. v. Wilson*, 1903, *Brown v. Hilson*, 1924, J.C. 1; *Adcock* 5 F. (J.) 88; 4 *Adam* 231.
v. Archibald, 1925, J.C. 58.

³ 1908 Act, § 19 (1).

² *Scott v. Anderson*, 1866, 5 Irv. 285; ⁴ *Dunn v. Mitchell*, 1911, S.C. (J.)
Lauder v. Brown, 1889, 17 R. (J.) 5; 2 46.

circumstances such failure might be fatal. In a recent case,¹ Lord Justice-General Clyde said: "By subsection (1) of § 19 of the Summary Jurisdiction Act, 1908, it is enacted that the description of an offence in the words of the statute contravened shall be sufficient. It follows that since this alteration of the law there are many complaints which must be regarded as relevant and sufficient, though they might not have passed muster prior to the Act of 1908. It is therefore in vain to quote cases decided before the 1908 Act, when the requirements of the law in the matter of specification of *modus* were applied rigorously—it may be too rigorously—to summary complaints. I do not, however, mean to cast any doubt upon the opinions which have been expressed in cases since the Act of 1908, to the effect that, if in the case of a statutory offence some further specification is necessary as a condition of fair notice, the Court has the right to insist on such further specification as a condition of relevancy."

Illustration.—A complaint in a Burgh Police Court charged the accused with allowing a motor car to stand in a street longer than was necessary for loading or unloading goods or for taking up or setting down passengers, contrary to § 381 (10) of the Burgh Police Act. It was held that the complaint was relevant, as it described the offence in terms of the section.²

If, however, the prosecutor strays from the statutory form his difficulties begin.

Illustration.—The Glasgow Police (Further Powers) Act, 1892, enacts: § 31—That every person who so uses, causes, permits, or suffers to be used any furnace or fire within the city (except a household fire) as that smoke issues therefrom, unless in certain circumstances, shall be liable to certain penalties. The owner of a steam wagon which emitted dense black smoke from its furnace was convicted on a complaint which charged him with using or causing to be used a furnace on the wagon "so that smoke of unnecessary density issued therefrom." It was held that the complaint should have followed the language of the statute, and that the introduction of the words "of unnecessary density" unaccompanied by any statement of a standard of density rendered the complaint irrelevant.³

There are cases also where even adherence to the words of a statute or an order may fail to give the accused notice of the offence with which he is charged. In the type of case already alluded to, there was a definite offence charged, while the specification of the *modus* was lacking. But occasionally cases arise where the statutory words themselves fail to set forth a relevant charge.

¹ *Yeudall v. William Baird & Co.*, 1925, J.C. 62. And see also *Renton v. Ramage*, 1910, S.C. (J.) 100; 6 Adam 266; *Smith v. Moody* [1903], 1 K.B. 56.

² *Watson v. Ross*, 1920, J.C. 27.

³ *Hemphill v. Smith*, 1923, J.C. 23.

Illustration.—Art. 5 of the Flour and Bread (Prices) Order, 1917, fixed the maximum price for bread at 2½d. per lb., and provided : “(b) A reasonable additional charge may be made for making delivery.” A baker was charged with a contravention of the order by selling five 2-lb. loaves at the price of 2s. 1d., being a price exceeding the cumulo amount of the maximum price of 1s. 10½d. “ and any reasonable additional charge you were entitled to make for making delivery in terms of the said order.” It was held that the complaint was irrelevant, as it failed to state what was the reasonable additional charge for delivery which had been exceeded.¹ Lord Johnston said : “ It is for the order which creates the offence to leave no dubiety as to what the offence is.”

Where the schedule attached to the 1908 Act gives the prosecutor a choice of alternative forms of charge, he must definitely choose one, and must not attempt to incorporate both.

Illustration.—The Motor Car Act, 1903, § 1, enacts that any person driving a “ motor car on a public highway recklessly or negligently shall be guilty of an offence under the Act.” Schedule C. of the 1908 Act contains the following form of complaint : “ You did drive a motor car recklessly (or negligently), and knock down and injure C. D., contrary to the Motor Car Act, 1903, § 1.” The accused was charged with driving “ recklessly or negligently.” It was held that the complaint was irrelevant, in respect that, not being in the form provided by the Act, it contained alternative charges without adequate specification.²

Where orders or regulations are made in pursuance of a statute and the offence charged is a contravention of such orders or regulations, it is desirable that some reference be made to the orders or regulations on the complaint instead of the complaint just baldly narrating the original statutes.³

Implied Circumstances.—The statement that an act was done contrary to a statute or order implies a statement that the statute or order applied to the circumstances existing at the time and place of the offence, that the accused was a person bound to observe the same, that any necessary preliminary procedure had been duly gone through, and that all the circumstances necessary to a contravention existed.⁴

In charges under the Coal Mines Regulation Act, 1887, for example, it used to be necessary to state that the *locus* was a mine to which the Act applied, and that the accused was a person bound to observe the rules made under the Act. In this and all similar cases the statement is implied.

¹ *Allan v. Howman*, 1918, J.C. 50;
cf. *Shepherd v. Howman*, 1918, J.C. 78.

³ *Penrice v. Brander*, 1921, J.C. 63.

² *Connell v. Mitchell*, 1913, S.C. (J.) 13;

⁴ *Ibid.* § 19 (2).

7 Adam 23.

Confirmation and Publication of Orders.—In the case of the contravention of an order, a statement in the terms above mentioned implies a statement that the order was duly made, confirmed, published, and generally made effectual according to the law applicable to the same, and was in force at the time and place in question.¹

Leading Section only Cited.—Where an offence is created by more than one section of one or more statutes or orders, it is necessary only to specify the leading section, or one of the leading sections.²

Although the provision, that it is sufficient for relevancy if a leading section of a leading statute or order is specified in the complaint, relieves the prosecutor from the consideration of some delicate questions, it does not free him from the necessity of naming a particular section of a particular statute, order, bye-law, rule, or regulation which he intends to put forward as the leading one. Nor does it relieve him of the necessity of ensuring that the section or sections chosen are leading sections within the scope of the enactment. The test in each case must be whether the complaint on the face of it gives to the person charged fair and reasonable notice of the offence with which he is charged.³

Illustration.—The owner of a motor car was charged with “having delivered a declaration such as is mentioned in the Revenue Act, 1869, § 22, relating to a motor car numbered S.D. 148, wherein the particulars required by said Act to be therein set forth were not fully and truly stated,” in that the cylinder measurements were not given “contrary to said section, whereby you are liable to the penalty of £20.” Sec. 22 neither creates an offence nor imposes a penalty, this being effected by § 25 of the same Act. It was held that the section was not “the leading section or one of the leading sections.”

Lord Dundas said : “In my opinion the test in each case for the Court to apply must be whether the complaint on the face of it gives to the person charged fair and reasonable notice of what it is he is charged with, and what offence he is said to have committed ; and I do not think that it can be said to be fair notice to select as the sole ground libelled one section of an Act, and to reserve for future introduction and application any number of unlabelled sections, some of which may bear directly on the charge.”⁴

The omission to specify the section of the statute alleged to have been contravened was in the former law, and may be still, fatal to a

¹ *Penrice v. Brander*, 1921, J.C. 63, § 19 (2), *supra*, p. 153.

² *Ibid.* § 19 (2).

³ *Macrorie v. Bird*, 1911, S.C. (J.) 105 ; 6 Adam 527.

⁴ *Ibid.*

conviction.¹ There is this difference, however, under the 1908 Act, that if the section has been inadvertently omitted and the omission is observed before the determination of the case, the complaint might, it is thought, be amended with the leave of the Court, provided this did not alter the nature of the offence or prejudice the accused.

Exceptions, Qualifications, etc.—Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany in the same section the description of the offence in the statute or order creating the offence, may be proved by the accused, but need not be specified or negated in the complaint, and no proof in relation to such exception, exemption, proviso, excuse, or qualification is required on behalf of the prosecution.²

Under this provision the accused person is entitled to the benefit of everything which can excuse his conduct, but the necessity is obviated of the prosecutor filling his complaint with unnecessary negatives.

Common Law and Statutory Offences combined.—It is competent to include in one complaint both common law and statutory charges.³

Prior to 1908, complaints for common law crimes and statutory contraventions were so distinct in form that it was practically impossible to combine a common law crime and a statutory charge in one complaint. The simple form under the 1908 Act admits of this course, and the above enactment permits it.

Accused acting in Special Capacity.—Where an offence is alleged to be committed in any special capacity, as by the holder of a licence, master of a vessel, occupier of a house, or the like, the fact that an accused person possesses the qualification necessary to the commission of the offence is, unless challenged by preliminary objection before his plea is recorded, held as admitted.⁴

This provision affects proof rather than libelling, but it may be mentioned here, because it indicates that, where an offence is alleged to be committed by a person in any special capacity, the fact that the accused person possesses that qualification has to be stated in the complaint. The fact being stated will be held as proved, unless the accused at the first calling of the case challenges the statement. In one case where no preliminary objection was taken by the accused, and the prosecutor at the trial did not found on the absence of

¹ *Kemp v. Macdonald*, 1889, 2 White 323; *Hastings v. Charles*, 1889, 18 R. (J.) 56; 2 White 325; *Whyte v. Robertson*, 1891, 18 R. (J.) 56; 3 White 245; *Buchanan v. Wilson*, 1896, 23 R. (J.) 86; 2 Adam 167; *Clarke v. Wood*, 1900,

3 White 207; *Rule v. Thomson*, 1901, 3 F. (J.) 32; 3 White 293; *Hotchkiss v. M'Cann*, 1902, 3 Adam 675.

² *Ibid.* § 19 (3).

³ *Ibid.* § 19 (4).

⁴ *Ibid.* § 19 (5).

objection, but joined issue with the accused on the question, evidence being led by both parties thereon, it was held that the prosecutor could not invoke the section on appeal.¹

Nationality of Ship.—In any proceedings under the Merchant Shipping Acts it is unnecessary to produce the official register of the ship referred to in such proceedings in order to prove the nationality of said ship, but the nationality of the ship as stated in the complaint is, in absence of evidence to the contrary, presumed.²

This provision also affects proof rather than libelling, but it has to be noted here because it reminds the prosecutor, in proceedings under the Merchant Shipping Acts, to state the nationality of any ship concerned in the charge.

Statement of Value of Stolen Property.—In offences inferring dishonest appropriation of property brought before a Court whose power to deal with such offences is limited to cases in which the value of such property does not exceed £10, it is to be assumed, and it is unnecessary to state in the charge, that the value of the property does not exceed said sum.³

This provision applies to procedure in justice of peace, burgh, and police Courts whose jurisdiction in offences inferring dishonest appropriation of property is limited to £10 value. The mere fact of instituting a complaint in such a Court implies, without any express statement, that the property is under that value.

Reference to Penalties.—There is a further point in connexion with the libelling of statutory offences which requires careful study. It is necessary to indicate the penalties to which, under the statute contravened, the accused person is liable. These particulars are not required in an Indictment, and many authorities are of opinion that they should not be required in a complaint. The opinion has prevailed, however, that in Summary Procedure it is desirable that the accused person and the judge should be informed of the statutory penalties, in order that the former may know to what he is liable, and the latter what he is entitled to impose.

The statute provides that a statutory charge must conclude thus : “Whereby you are liable to the penalties set forth in said section” (or, “in section of said Act,” or *otherwise as the case may be; or, if preferred, the penalties may be shortly set forth*) (schedule C.).

The Act follows what was already the existing practice, and gives the prosecutor the option of either referring to the section or sections imposing the penalty⁴ or of shortly setting forth the penalty. The

¹ *Archibald v. Plean Colliery Co.*, 1924, J.C. 77.

² *Ibid.* § 19 (6).

³ *Ibid.* § 19 (7).

⁴ *Holland v. Gauchalland Coal Co.*, 1867, 5 Irv. 561; *Galt v. Ritchie*, 1873, 11 M. 971; 2 Coup. 470.

question which course it is desirable to follow will depend upon circumstances. It will be kept in view that under § 47 of the Act imprisonment in default of payment of a penalty is in every case competent, and that whether the statute imposing the penalty does or does not prescribe any method of recovery. For a large number of statutory offences a pecuniary penalty only is imposed, on non-payment of which imprisonment is competent in terms of this section. The simplest method of referring to such penalties, and one which readily lends itself to the adaptation of a printed form is: "Whereby you are liable to a penalty not exceeding £ , and in default of payment to imprisonment in terms of § 48 of the Summary Jurisdiction (Scotland) Act, 1908." On the other hand, where the accused is liable to other than pecuniary penalties, such as imprisonment without the option of a fine, forfeitures, etc., involving a considerable narrative, it is simpler to refer to the section or sections in which the penalties are set forth. The heading of the complaint intimating that it is brought under the Summary Jurisdiction Act is sufficient intimation to the accused that the general provisions of that Act apply, *e.g.*, the limitation of the periods of imprisonment, the powers of mitigation, admonition, competency of civil diligence in certain cases, etc. It is therefore quite unnecessary to refer in the complaint to any of these sections.¹ Under the former practice, where a penalty was recoverable by civil diligence in the first instance, imprisonment being only competent in default of such recovery, a reference to the pecuniary penalty was sufficient, without dealing with the method of recovery. On the other hand, if immediate imprisonment in default of payment was competent, this had to be set forth either directly or by reference to the section imposing it. In view of the fact that imprisonment (where practicable) is now in every case competent in default of payment of a penalty, the question arises whether, when a statute imposes a penalty without any reference to the method by which it is to be recovered, or provides for its recovery by civil diligence, it is sufficient simply to specify the amount of the penalty or to refer to the section imposing it. It is thought that a specification or reference such as would have been sufficient under the former law would still be sufficient, but it is perhaps better to avoid all question by either specifying the penalty and alternative imprisonment in the form already suggested, or by referring not only to the section imposing the penalty, but also to § 48 of the Summary Jurisdiction Act. It would appear that so long as the prosecutor who avails himself of the option of referring to the proper sections does so, and no more, no objection can be taken.² If, however, the prosecutor chooses the

¹ *Macleod v. Terrass*, 1892, 20 R. (J.) 6; 3 White 339; *MacEwen v. Abinger*, 1894, 21 R. (J.) 14; 1 Adam 314. ² See *Cumming v. Frame*, 1909, S.C. (J.) 56; 6 Adam 57.

other alternative and sets out the actual penalties, he must ensure that they are adequately set out.

Illustrations.—In a complaint under the Summary Procedure Act, 1864, the penalties were insufficiently set forth, and the Court held that the magistrate had been misled as to his powers of punishment, and a conviction was set aside.¹

In a prosecution for a contravention of the Prevention of Crimes Act, 1871, the prosecutor omitted to set forth that the accused was liable to imprisonment without the option of a fine. The complaint bore to be brought under the Summary Jurisdiction Acts, but the prosecutor did not specially refer to the power of modification under § 6 of the 1881 Act. A pecuniary penalty was imposed. Suspension of a conviction was refused on the grounds (*a*) that the accused had suffered no prejudice by the omission, and (*b*) that it was unnecessary to make special reference to the Act of 1881, the procedure being under the Summary Jurisdiction Acts.²

In one case no reference was made to penalties or any section imposing penalties. The conviction was quashed. Lord Justice-General Robertson said: "The complainer may either name the penalties or he may refer by chapter and section to the enactment which sets them forth. But it will not do to libel two Acts of Parliament, and then bid the accused read them through and find out what he is liable to."³

In a prosecution under § 70 of the Education (Scotland) Act, 1872, the complaint referred to the pecuniary penalty to which the accused was liable, without mentioning the liability to imprisonment without the option of a fine. The accused, having pled guilty, was sentenced to fourteen days' imprisonment. The conviction was suspended in respect that the reference to penalties was defective and misleading.⁴

Risks attending Simplification of Charge.—There is one general observation to be made upon these abbreviated forms of charge. They are very convenient in practice, but they are open to a certain risk. It must be remembered that, although the statement of certain elements and circumstances essential to the constitution of a relevant charge is held to be implied in the complaint, this does not relieve the prosecutor from the necessity of proving these matters at the trial, except where, in terms of the statute, they are held as admitted. When they were stated in the complaint, they were kept under the observation of the prosecutor, and he led proof in regard to them as a matter of course. Now, however, when they are not mentioned

¹ *Thomson v. Wardlaw*, 1865, 5 Irv. 45.

² *Macleod v. Terrass*, *supra*.

³ *Jackson v. Stevenson*, 1897, 24 R. (J.) 38; 2 Adam 255.

⁴ *Mackenzie v. Cadenhead*, 1897, 25 R. (J.) 44; 2 Adam 443. See also *Reid v. Miller*, 1 F. (J.) 89, 1899; 3 Adam 29.

in the complaint, there is a risk of their being overlooked. The practical lesson is that the prosecutor, before going to trial, must make himself acquainted with all the facts which it will be necessary for him to prove, irrespective of whether they are specified in the charge or not.

7. *Oath of Verity*

A few Acts of Parliament introduced into Scotland the English form of a preliminary oath.¹ Where, as preliminary to any procedure, a sworn information is required, it may be sworn to before any judge, whether the subsequent procedure is in his Court or in another Court.² This removes the doubt which sometimes arose whether the oath of verity in a complaint under the Poaching Prevention Act could be emitted before a Justice of the Peace, seeing that the jurisdiction of Justices of the Peace is in Scotland excluded under the Game Acts.

Where a preliminary oath has to be taken, the Justice of Peace puts the witness on oath in ordinary form, reads to him the statement of charge, and asks him whether that is true. The witness depones that it is true, and the oath is signed by him and the Justice of Peace. The omission of the oath, where it is a statutory preliminary, is fatal to the proceedings.³

8. *Warrants and Orders*

When a summary complaint has been duly prepared and signed, the prosecutor has to consider whether it is necessary to apply to the Court for any warrant or order. If the accused person is merely to be summoned to appear before the Court, no warrant is required unless it is necessary to arrange for any special diet. The Act itself is a sufficient warrant for such citation.⁴ It is only necessary to lay the complaint before a judge when it is desired to obtain a warrant to apprehend, or a search warrant, or some special order of the Court.

On any complaint under the Act being laid before a judge of the Court in which the complaint is brought, such judge has power on the motion of the prosecutor—

- (1) To pronounce an order of Court assigning a diet for the disposal of the case, to which the accused may be cited as after mentioned.
- (2) To grant warrant to apprehend the accused, where this appears to such judge expedient.
- (3) To grant warrant to search the person, dwelling-house, and repositories of the accused, and any place where he may be

¹ See *M'Donald v. Milne*, 1897, 25 R. (J.) 41; 2 Adam 457.

³ *Morris & Boyd v. Earl of Glasgow*, 1867, 5 Irv. 529.

² 1908 Act, § 16.

⁴ 1908 Act, § 21.

found, for any documents, articles, or property likely to afford evidence of his guilt or of guilty participation in the premises, and to take possession thereof.

- (4) To grant any other order of Court or warrant, or interim order of Court or warrant, which may be competent in the premises.¹

Warrants of apprehension and search must be signed by the judge granting them; but all other warrants, orders of Court, and sentences may be signed either by the judge or Clerk of Court. Execution upon any warrant, order of Court, or sentence may proceed either upon such warrant, order of Court, or sentence itself, or upon an extract thereof issued and signed by the Clerk of Court.²

The power conferred upon the Clerk of Court to sign sentences was new to Summary Procedure. It brought summary procedure into line with the practice in procedure by Indictment. In this connexion, however, the definition of "Clerk of Court" in § 2 must be kept in view. The Clerk, if not the principal clerk or his depute, must be "duly authorised" to exercise the duties of Clerk of Court; and "duly authorised," having regard to previous decisions, would doubtless be interpreted as meaning duly authorised in writing.³

9. Citation of Accused Person and Witnesses

It is enacted that the 1908 Act itself is a sufficient warrant for the citation of the accused and witnesses to any ordinary sitting of the Court, or to any special diet which may be fixed by the Court, including any adjournments thereof. Such citation is in the forms contained in schedule D. In the case of the accused it proceeds on an *induciae* of at least forty-eight hours, unless in the special circumstances of any case the Court fix a shorter *induciae*.⁴ In the ordinary case the *induciae* allowed is more than forty-eight hours. It must be kept in mind that certain statutes prescribe their own *induciae*. Prior to the passing of the 1908 Act, failure to adhere to the *induciae* prescribed by such statutes was fatal to the proceedings,⁵ but the point has not been considered in the light of the powers conferred on the Court by § 75.

The power conferred on the Court by this section to shorten the *induciae* in special circumstances is one of much value. The corresponding section in the Act of 1864 was § 6, which rendered a forty-eight hours' *induciae* for citation compulsory. In some cases—as, for example, when the proceedings were against a soldier or sailor only temporarily resident for a short period within the jurisdiction—

¹ 1908 Act, § 20.

⁴ 1908 Act, § 21.

² *Ibid.* § 16. See p. 332, *infra*.

⁵ *Dunlop v. Goudie*, 1895, 22 R. (J.)

³ *Brown v. Neilson*, 1907, S.C. (J.) 3; 5 Adam 149.

34; 1 Adam 554; *Laird v. Anderson*, 1895, 23 R. (J.) 14; 2 Adam 18.

it was impossible to get the full *induciæ*, with the result that proceedings had sometimes to be dropped altogether. A prosecution can now, in such circumstances, take place within a few hours after service, but, of course, care must be taken that the proceedings are not so rapid as to involve any prejudice to the accused.

It is to be deemed a legal citation of such accused or witness—

- (a) If the citation be delivered to him personally or left for him at his dwelling-place or place of business with some person resident or employed therein, or if he has no known dwelling-house or place of business, at any other place in which he may at the time be resident ; or
- (b) In the case of the accused being a master of, or seaman or person employed in any ship or vessel, in the hands of a person on board thereof and connected therewith ; or
- (c) In the case of the accused being a company, association, or incorporation, at their ordinary place of business in the hands of a partner, director, secretary, or other official thereof, or such company, association, or incorporation, may be cited in the same manner as if the proceedings were in the civil Court ; or
- (d) In the case of the accused being a body of trustees, by serving a complaint on any one of their number resident in Scotland, or on their known law agent there.¹

In the matter of service, the utmost care must be taken to secure that the citation will reach the person for whom it is intended. Sec. 6 of the 1864 Act required either personal service or that the citation be left at the dwelling-house of the person cited if he could not be got personally. The methods by which citation may be competently made are widened under the 1908 Act, and follow closely the provisions of § 472 of the Burgh Police Act, 1892 ; but while designed to simplify service in certain cases, these provisions do not affect the former practice of endeavouring to effect personal service wherever practicable, or, failing this, of leaving the citation in the hands of some responsible person, with instructions to see to its delivery. Such care is especially necessary in regard to service on board ship.

Citation or Service of Complaint not essential.—But while it is desirable to ensure that citation is made, it must be remembered that the statute contains no express provision requiring citation or service of the complaint. It was observed in one case² : “ In § 29 it is provided that where the accused is present at the first calling of the case, the complaint or the substance thereof shall be read to

¹ 1908 Act, § 21.

² *Kelly v. Rae*, 1917, J.C. 12.

him. That seems to me to imply that service is not necessary, because, if service were an essential, there would be no reason for providing that the complaint should be read. What, however, is still more striking is the provision in § 32 (2), that, in the circumstances there dealt with, 'the prosecutor shall, if desired by the accused, furnish him with a copy of the complaint if he has not already got a copy.' It seems to me that that provision is consistent only with the view that in certain circumstances service of the complaint is not an essential to the institution of the proceedings."

Illustration.—A miner on a Saturday was arrested *in flagrante delicto* and taken into custody on a charge of street betting. On Monday he was brought before a magistrate, when the charge was made in his presence. Having pleaded "not guilty," he was released without bail, the trial being fixed for the following Monday. Upon that day the accused and his law agent appeared in Court and the complaint was read over to him. After hearing evidence the magistrate convicted. The complaint was never served upon the accused, and no copy of it was given to him or his agent; but no request for a copy was made by either of them. It was held that service was not essential.¹

Precognition.—Prior to 1908 there was no way in the Sheriff Court of compelling the attendance of witnesses for precognition in Summary proceedings, until some person had been charged with an offence. Prosecutors had thus sometimes great difficulty in ascertaining the facts of certain cases. Powers of this nature were by § 474 of the Burgh Police Act, 1892, conferred on burgh prosecutors, and these powers were made generally applicable by § 21 of the 1908 Act. The provisions of that section as to the citation of witnesses apply to the citation of witnesses for precognition by the Procurator-Fiscal or burgh prosecutor, where the judge on the application of such Procurator-Fiscal or burgh prosecutor shall deem it expedient to grant warrant to cite witnesses for precognition in regard to any offence competent for trial in the Court of such judge, and whether or not any person has at the time of such application been charged with such offence.

It is only a very exceptional case that calls for the exercise of this power, as the fact that the power exists is, in the majority of cases, sufficient to ensure that the information desired will be furnished.² Where it is necessary to apply for warrant to cite witnesses in such circumstances, a Petition in the form given in schedule F. would be suitable.

¹ *Kelly v. Rae*, 1917, J.C. 12.

² *Forbes v. Main*, 1908, S.C. (J.) 46; 5 Adam 503; p. 42, *supra*.

10. *Service of Warrants, etc.*

Any complaint, warrant, or other proceeding under the 1908 Act may without endorsement be served or executed at any place within Scotland by any officer of law. Such service or execution may be proved either by the oath in Court of such officer or by production of his written execution.¹

Service or execution out of Scotland is regulated by the Indictable Offences Act, 1848,² the Indictable Offences Act Amendment Act, 1868,³ and the Summary Jurisdiction (Process) Act, 1881.⁴ Any warrant, order of Court, or process under said Acts may be served or executed in Scotland by any officer of law. The Indictable Offences Act, 1848, and the Indictable Offences Act Amendment Act, 1868, apply for the purposes of the 1908 Act to all offences which may be tried by the Court issuing any competent warrant, order of Court, or other process.

The provisions as to service are much the same as those contained in §§ 8 and 9 of the 1864 Act, but there is now distinct provision for service being proved either by the oath in Court of the officer serving or by his written execution. Some doubt previously existed as to how far the Indictable Offences Act, 1848, and the Indictable Offences Act Amendment Act, 1868, applied to Summary process. This section makes it clear that these Acts apply to all offences tried under the Summary Jurisdiction Act, and to the execution of every form of process issued under that Act; this will specially apply to the execution of process in Ireland where necessary, as the provisions of the Summary Jurisdiction (Process) Act, 1881, do not apply to that country. For the execution of Summary process in England the provisions of the last-mentioned Act will generally be found sufficient.

Reference may be made to what was said on this subject in Part I.⁵ It will be observed that a written execution of service is provided by the Act.

11. *Apprehension of Accused*

The law of arrest, with or without a warrant, was discussed in Part I.⁶ It is therefore only necessary to consider in this place the special rules of Summary Procedure.

It ought to be mentioned that there are strict rules applicable to the apprehension of young persons under sixteen years of age. These are explained in Part III.⁷

Special procedure has to be adopted in the case of the arrest of a person of unsound mind.⁸

¹ 1908 Act, § 25.

² 11 & 12 Vict. c. 42.

³ 31 & 32 Vict. c. 107.

⁴ 44 & 45 Vict. c. 24.

⁵ P. 65, *supra*.

⁶ P. 26, *supra*.

⁷ P. 252, *infra*.

⁸ P. 288, *infra*.

Warrants of apprehension and search are in accordance with the forms contained in sched. D. All such warrants, where it is necessary for their execution, imply warrant to officers of law to break open all shut and lockfast places, and to search for and to apprehend the accused, and to bring him before the Court issuing such warrant, or before any other Court competent to deal with the case, to answer to the charge on which such warrant is granted, and, in the meantime, until he can be so brought, to detain him in a police station house, police cell, or other convenient place. Any person apprehended under such warrant or by virtue of the powers possessed at common law, or conferred by statute, must wherever practicable be brought before a Court competent to deal with such case either by way of trial or by way of remit to another Court, not later than in the course of the first lawful day after such person has been taken into custody, such day not being a day set apart for a general fast or a public or local holiday.¹

A warrant of apprehension or other warrant is not required for the purpose of bringing before the Court an accused person who has been apprehended without a written warrant, or who attends without apprehension in answer to any charge made against him.²

A warrant of apprehension of a witness in said form implies warrant to officers of law to search for and apprehend such witness, and to detain such witness in a police station house, police cell, or other convenient place, until the date fixed for the hearing of the cause, unless sufficient security be found to the amount fixed in such warrant for the appearance of such witness at all diets of Court.³

The Criminal Justice Administration Act,⁴ 1914, provides that where at common law or under any Act of Parliament there is power to arrest a person without warrant, a warrant for his arrest may be issued.

In any proceedings under the Act, the accused, if apprehended, is immediately on apprehension entitled, if he so desires, to have intimation sent to any law agent, and to have a private interview with such law agent prior to being brought before the Court.⁵

12. *Apprehension of Witness*

Where a witness, after being duly cited, fails to appear at the diet fixed for his attendance, and no just excuse is offered on his behalf, the Court may issue a warrant for his apprehension. The Court, if satisfied by evidence on oath that a witness is not likely to attend to give evidence without being compelled so to do, may

¹ 1908 Act, § 23.

⁴ § 27.

² *Ibid.*

³ *Ibid.*

⁵ 1908 Act, § 15.

issue a warrant for the apprehension of such witness in the first instance.¹

The power to issue a warrant for the apprehension of a witness who fails to attend after being duly cited is one which should be exercised with caution. As a general rule it is better not to move for a warrant of apprehension at the time, and before taking any action to ascertain whether there is any reasonable explanation for the non-attendance of the witness. If there is, he should be cited again if the diet has been adjourned. It is always competent to proceed by Summary Complaint for contempt of Court against a witness who wilfully fails to obey his citation,² and this course received the approval of the High Court in the case of *Petrie v. Angus*.³ The power to issue a warrant to arrest and detain a witness likely to abscond is one seldom required in Summary Procedure, and one which should never be exercised unless in most exceptional circumstances, where it is evident that, unless such a warrant is granted, the ends of justice will be defeated.

13. Bail

The provisions of the Bail Act, 1888, apply to Summary cases. Accordingly, where a Sheriff-Substitute, on the accused pleading not guilty, adjourned the diet for nine days and refused bail, it was held competent for the accused to appeal to the High Court of Justiciary. Lord Justice-Clerk Alness pointed out that what the Sheriff-Substitute had in effect done was to refuse bail "after commitment until liberation in due course of law," and that § 8 of the Bail Act applied.⁴

As there is no preliminary petition in Summary Procedure for warrant to apprehend, the question of bail does not usually arise for consideration until the accused person is before the Court. As this would lead in many cases to hardship through a respectable person being detained in the police cells on a trivial charge, the power conferred on police officers by § 13 of the County Police Act, 1857, and by § 471 of the Burgh Police Act, 1892, to accept bail in cases where an accused person has been apprehended without a written warrant, has been made generally applicable. It is not competent for bail to be accepted on a serious charge, and it should not as a general rule be taken from a person who has no fixed residence within the jurisdiction of the Court, unless the offence is of a very trifling nature, nor should it be taken from a person who is not a law-abiding citizen.

Upon the apprehension of any person charged with any offence which may be competently tried before a Court of Summary Criminal

¹ 1908 Act, § 22.

² See § 36 of 1908 Act.

³ 1889, 17 R. (J.) 3; 2 White 358.

⁴ *Liddell v. Strathern*, 1926, J.C. 107.

Jurisdiction (other than the Sheriff Court), it is lawful for the chief constable, or other officer of police having charge in absence of the chief constable at any police office or station, to accept of bail or deposit, by a surety or by such person, that such person shall appear for trial before such Court, or before the Sheriff Court, at some time and place to be specified, and at all after diets of Court, and to liberate the person so apprehended upon bail being found to an amount not exceeding £20, or upon the deposit of any money or article of value to the amount of the bail fixed. The chief constable, or other officer of police, if deposit be accepted, must immediately enter the same in a book to be kept for the purpose, and grant an acknowledgment for the money or article so deposited, in which acknowledgment the time and place fixed for the accused's appearance must be set forth.¹

The chief constable or other officer of police may refuse, if he see cause, to accept bail in any shape; and the refusal to accept bail or deposit, and the detention of the person so apprehended until the case of such person is tried in the usual form, does not subject the chief constable or other officer of police to any claim for damages, wrongous imprisonment, or claim of any other kind whatsoever.²

It is lawful to liberate any such person without bail, or to discharge him, if the chief constable or other officer deem it proper to do so.³

If any person fail to appear in redemption of his bail or deposit, not only may the same be forfeited, but warrant may be granted for his apprehension.⁴

14. *Adjournment for Inquiry*

The Court, in order to allow time for inquiry or for any other necessary cause, and without calling on the accused to plead to any charge against him, may, from time to time, continue the case for such reasonable time as may in the circumstances be necessary, not exceeding in all a period of seven days, or, on special cause shown, fourteen days, from the date of the apprehension of the accused, and may liberate him on bail or commit him to prison either without bail or with bail to an amount fixed by such Court. No judge is entitled to allow bail in any case which he is not competent to try.⁵

The provision meets certain difficulties which may arise, *e.g.*, in a case which may either infer a grave charge or a minor one, according to facts which cannot be ascertained at the moment, or again, where a delinquent is a stranger to the police and it is necessary to institute inquiries about him. Such a case can be adjourned for a reasonable

¹ 1908 Act, § 14.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.* § 24.

period, within which it will be ascertained what further steps are proper. Many other contingencies will suggest themselves, in which this power to adjourn before asking the accused person to plead will facilitate the administration of justice. The adjournment should be for as short a period as will permit of the inquiry being made. If necessary, further continuations can be got, not exceeding in all the periods prescribed in the section.

CHAPTER III

PROCEDURE AT TRIAL

By the word "trial" is usually understood the diet, whether first, second, or subsequent, at which evidence is led in support of the complaint.

Although the general principles of trial are the same, whether in a case instituted by an Indictment or by a complaint, the procedure in the latter is more rapid and less formal. Where the accused is not represented by an agent it is the duty of the presiding judge to inform the accused that he is entitled to lead evidence in defence and to address the Court on the evidence which has been led in the case.¹ As no list of witnesses or productions is required from either party, both prosecution and defence have to move to a certain extent in doubt as to the case which the other side intends to establish. It is also possible to introduce new evidence at any time before the case for either side has been closed. The difficulty caused by these matters is sometimes obviated by a friendly exchange of information between prosecution and defence, and the provisions in § 39 of the 1908 Act for admissions being accepted in lieu of evidence may, in certain cases, be helpful in obviating expense and delay.²

1. *Form of Record*

The Clerk of Court need only note in the briefest terms what is done at the trial.

Proceedings under the Act are conducted summarily, *viva voce*, and, except where otherwise provided, no record need be kept of the proceedings other than the complaint, the plea, a note of any documentary evidence produced, and the conviction and sentence, or other finding of the Court. In the event of any objections being stated to the competency or relevancy of the complaint or proceedings, or to the competency or admissibility of evidence, such objections, if either party desire it, are noted in the record.³ Failure to note such objections vitiates the whole proceedings.⁴

The proceedings may be either in writing or printed, or may be partly written and partly printed, and all forms bearing reference

¹ *Graham v. M'Lennan*, 1911, S.C. 571; *ways Co.*, 1912, S.C. (J.) 23; 6 Adam (J.) 16; 6 Adam 315.

³ 1908 Act, § 41.

² See *Nimmo v. Lanarkshire Tram-*

⁴ *Connell v. Mitchell*, p. 176, *infra*.

to any antecedent form may be either on the same sheet of paper therewith or on a separate sheet attached to it.¹

Witnesses' Names.—It is unnecessary to record the names of the witnesses examined. The dispensation with the necessity of keeping a record of the names and designations of witnesses was intended to meet the case of the Police Court in large cities. In many offences of a comparatively trifling nature this provision of the statute may well be taken advantage of; but in any case of importance, and more especially in any case at all likely to be made the subject of an appeal, it is desirable that a record of the names and designations of the witnesses examined should be preserved for future reference. As such a record is no longer a statutory requisite, any error in entering the name or designation of a witness would not, however, affect the validity of a conviction.

Documentary Productions to be Recorded.—It is still necessary to keep a note of any documentary evidence produced, but it has to be observed that it is only necessary to note documents actually produced by the witnesses as evidence in the case, and which are competent evidence.² What is truly documentary evidence of the character which should be noted is often a question of some difficulty. The cases referred to illustrate some typical examples. Lord McLaren stated as the test: "Is it necessary that the judge should read the contents of the writing produced, or is it only shown to the witnesses for the purpose of identification?"³ The same judge in a subsequent case pointed out that "the reason for noting is that in case of an appeal, the Court may know the evidence upon which the conviction proceeds, and in case of the judge refusing to admit the paper, that the Court may consider whether it was properly or improperly rejected."⁴

Any risk of error in connexion with failure to record documentary productions would be obviated if, when a document is produced by a witness, the Clerk of Court would ask either the prosecutor or the agent for the accused, as the case may be, whether it is desired to make that document a production in the case. In the event of any difference of opinion as to whether or not it is compulsory to treat the document as a production requiring to be put in, the decision of the Court should be taken on the point. If the document is put in, it should be at once numbered and initialled by the Clerk, and the date of production noted on it. The numbers in the

¹ 1908 Act, § 42.

³ *Jacobs v. Hart*, 1900, 2 F. (J.) 33;

² *Eastburn v. Robertson*, 1898, 1 F. (J.) 14; 2 Adam 607; *Marshall v. Phyn*, 1900, 3 F. (J.) 21; 3 Adam 262; *Reid v. Neilson*, 1907, 5 Adam 401.

3 Adam 131.

⁴ *Ogilvy v. Mitchell*, 1903, 5 F. (J.) 92; 4 Adam 237.

inventory in the record should correspond with the numbers on the documents, and when this is attended to, the nature of the documents may be very shortly noted. A form is suggested in the Appendix.

Prior to the 1908 Act, failure to note documentary productions was frequently fatal to a conviction.¹ But while the 1908 Act makes such noting a necessary step, it does not follow that failure to note will be fatal. The reason for this is to be found in § 75, which provides that no conviction shall be quashed unless on the ground of incompetency and certain other grounds.² A mere incidental fault in procedure will not amount to incompetency.³ But the Court has always tended to regard an omission to note as a matter of substance and not of mere form.⁴ It may be, however, that the remedy of an accused, where there has been a fault in procedure of comparatively slight character, is not to ask that the conviction be quashed, but to invoke the Court's power to amend the sentence.⁵

Regulations and Orders.—The Act lays down that any Order by any of the departments of State or Government, or any local authority or public body, made under powers conferred by a statute, or a print or copy of such order, shall, when produced in any proceedings under this Act, be received in evidence of the due making, confirmation; and existence of such order without being sworn to by any witness, and without any further or other proof, but without prejudice to any right competent to the accused to challenge any such order as being *ultra vires* of the authority making it, or on any other competent ground, and where any such order is referred to in the complaint, it shall not be necessary to enter it in the record as a documentary production.⁶ The scope of this enactment has been the subject of a number of decisions. In *Todd v. Anderson*⁷ it was held that certain Regulations for the Territorial Force fell within the section, and might be proved by production of a copy but that the Court does not take judicial notice of the Regulations, and that a prosecutor desiring to found on them must lodge a copy in process before closing his case. In *Brander v. Mackenzie*,⁸ a prosecution under a Regulation under the Defence of the Realm Act, the Court held that such an order fell under § 38 (2), and that being unchallenged it was sufficiently proved by the production

¹ *Oliphant v. Wilson*, 1889, 17 R. (J.) 12; 2 White 403; *Strachan v. Watson*, 1893, 20 R. (J.) 76; 1 Adam 55; *Eastburn v. Robertson*, 1898, 1 F. (J.) 14; 2 Adam 607; *Avery v. Hilson*, 1906, 8 F. (J.) 60; 5 Adam 56.

² *Silk v. Middleton*, 1921, J.C. 69. Cf. *Sutherland v. Shiach*, 1928, S.N. 81.

³ *Robson v. Menzies*, 1913, S.C. (J.) 90; 7 Adam 156.

⁴ *Burns v. Williamson*, 1897, 24 R. (J.) 58; 2 Adam 308; *Ogilvy v. Mitchell*, *supra*.

⁵ *Silk v. Middleton*, *supra*.

⁶ § 38 (2).

⁷ 1912 S.C. (J.) 105.

⁸ 1915 S.C. (J.) 47.

in the proceedings of an uncertified copy of the order. The Lord Justice-General expressed the opinion that the order, being unchallenged, it was unnecessary to produce even a copy. In *M'Avoy v. Cameron*,¹ the Court, following *Todd v. Anderson*, quashed a conviction under an order under the Defence of the Realm Regulations on the ground that the prosecutor was bound to produce at the trial copies of the Regulations and the order. The whole question was then considered by a full Bench in the similar case of *Macmillan v. M'Connell*,² where it was held that the production of the Regulations and orders was unnecessary. The ground of judgment was that the order, being one which had the force of a statute, it became part of the law of the land from the date when it came into force, and did not require to be proved any more than an Act of Parliament requires to be proved. But it was pointed out that the ground of judgment did not affect § 38. *Todd v. Anderson* was not overruled, but *M'Avoy v. Cameron* was. The result of these cases appears to be that wherever an order or regulation can be regarded as part of the general law of the realm it does not require to be proved. But it does not appear that in cases dealing with regulations or orders lacking this *quasi*-statutory quality a prosecutor is in safety to omit its production.

2. *Accused Fails to Appear*

When the complaint has been duly served on the accused person and called in Court at the appointed diet, it may happen that the accused is neither personally present nor (in a case in which it is competent) represented by a law agent, or any other person duly authorised to appear for him. Several alternative courses are open to the Court, which are not restricted to the first diet, but may be adopted at any diet at which the accused fails to appear after receiving intimation.

Where the accused fails to appear at any diet of which he has received intimation, or to which he has been cited, the following provisions apply :—

- (1) The Court may adjourn the trial to another diet, and order the accused to attend at such diet, and appoint intimation thereof to be made to him. Such intimation is sufficiently given by an officer of law, or by registered letter signed by the prosecutor and sent by post to the accused, at his last known address. The production in Court of the written execution of such officer, or of the post office receipt for such registered letter, is sufficient evidence of such intimation having been duly given. Where from any cause a

¹ 1917, J.C. 1.

² 1917, J.C. 43.

diet for trial has to be continued from day to day, it is not necessary to intimate such continuation to the accused.¹

- (2) Where the accused is charged with any statutory offence involving the imposition of a pecuniary penalty only, in the first instance, or where the statute founded on or conferring jurisdiction authorises procedure in the absence of the accused, the Court may,² on the motion of the prosecutor and upon proof that the accused has been duly cited, or has received due intimation of the diet where such intimation has been ordered, proceed to hear and dispose of the case in the absence of the accused. Unless the statute founded on authorises conviction in default of appearance, proof of the complaint must be led to the satisfaction of the Court. The Court in any case to which this subsection applies may, if it shall judge it expedient, allow any law agent to appear and plead for and defend the accused, provided the Court is satisfied that he has authority from the accused so to do. The Court may also allow a plea to be tendered for the accused by a person other than a law agent, provided the plea is one of guilty, and the Court is satisfied that such person has authority to tender such plea.³
- (3) The Court may grant warrant to apprehend the accused.⁴
- (4) The Court may, on the motion of the prosecutor, forfeit any bail deposited or found for the appearance of the accused ; or, where the accused has been ordered to attend under a penalty, may declare such penalty to be forfeited. Such bail or penalty may, where necessary, be recovered as provided for in § 50 of the Act.⁵ In addition to such forfeiture the Court may grant warrant to apprehend the accused.⁶

Intimation of an adjourned diet may be given to the accused person by a registered letter sent by post, thus obviating service by an officer. If a case is not reached on the first day, or for any other reason has to be continued from day to day, intimation is not necessary.

Trial in Absence.—The right to proceed to trial in absence arises in two cases :—

- (1) Where the Act of Parliament contravened imposes a pecuniary penalty only in the first instance ; or

¹ 1908 Act, § 33.

⁴ *Ibid.* See *Walker v. Brander*, 1920,

² See *Powdrell v. Galloway*, 1904, 7 S.C. 840.

F. (J.) 9 ; 4 Adam 432.

⁵ P. 239, *infra*.

³ *Ibid.*

⁶ *Ibid.*

- (2) Where the Act of Parliament, whatever punishment it imposes, authorises procedure in the absence of the accused person.

Procedure in absence is thus incompetent in regard to a common law crime, as to which imprisonment in the first instance is always a possible punishment.

The admission of a law agent duly authorised by the accused to appear for him when he is absent, tender a plea on his behalf, and defend him, is a privilege allowed to the accused person for the first time in the Sheriff and Justice of Peace Courts. It is granted only in the two cases in which the Court may proceed to trial in absence, above specified.

Where the accused person, in a case of the same class, wishes to plead guilty, and does not choose to employ a law agent, he can be represented by any person duly authorised. It is necessary for such person to satisfy the Court that he holds authority. It will probably be considered sufficient evidence if such person produces the service copy of the complaint, with a memorandum written by the accused person and signed by him, stating that he authorises such person to appear and tender a plea of guilty on his behalf. It will be noted that there is a difference between the two representatives. A law agent duly authorised may tender a plea of guilty or not guilty, and in the latter case conduct the defence in absence; a person not a law agent can only tender a plea of guilty. It may probably be considered desirable, in most cases where a plea of guilty is tendered on behalf of, and in absence of, an accused person under this section, that the plea should be signed by the person tendering it.

Service of a complaint is proved (*a*) by the oath in Court of the officer who served it; or (*b*) by production in Court of his written execution.¹

The question as to the procedure which it is desirable to adopt, where an accused person, who has been duly cited to a diet, fails to appear, must depend upon circumstances. If there are grounds for thinking that the failure to appear may not be wilful, it is generally best to adjourn the case to a future diet, intimation of which will be made to the accused. Should he again fail to appear at the adjourned diet, the Court will have little hesitation in granting a warrant for his apprehension. It is often convenient, in statutory offences involving in the first instance a pecuniary penalty only, to proceed in absence of the accused, but this should only be done if the prosecutor is satisfied that the accused has been validly cited to the diet. A conviction obtained in absence where the citation was defective would almost certainly be set aside by the High Court.

¹ 1908 Act, § 25.

Where an execution of citation is produced as evidence of citation, it should be noted in the record.¹

3. *Accused Appears and Pleads Guilty*

The most simple form of trial takes place when the accused person is either personally present or is (in a case in which it is competent) represented by an authorised law agent, or other person, and when he or his representative pleads guilty to the charge. It will be convenient to consider the steps separately.

Pleading.—The complaint, or the substance of it, is read to the accused person.² It is not necessary to read the whole complaint. It is sufficient if the charge is read—that is to say, the circumstances of time, place, and mode; thus: “You are charged that on 8th June 1926, in High Street, Edinburgh, you did conduct yourself in a disorderly manner, and commit a breach of the peace; and you have been previously convicted of breach of the peace.” The accused is then asked if he pleads guilty or not guilty. It is competent, before pleading, to state objections to the competency or relevancy of the complaint or proceedings; but as such objections will usually be taken only where the accused is to plead not guilty, consideration of the subject may be deferred.³

Sentence.—Where the accused pleads guilty to the charge or to any part thereof, and such plea is accepted by the prosecutor, such plea is recorded and signed by the judge or Clerk of Court. The Court thereafter disposes of the case at the same or any adjourned diet.

The accused person does not require to sign his plea, which is authenticated by the signature of the judge or Clerk of Court. To save double signature, the plea and sentence may be combined: “Compeared the accused, and in answer to the complaint, pled guilty, and was sentenced to sixty days’ imprisonment.”⁴

The whole question of punishment is discussed in Part III., Chapter I.⁵

Youthful Offenders.—In the case of young persons under the age of sixteen years, it is necessary to follow carefully the course of procedure prescribed by the Children Act, 1908.

Persons of Unsound Mind.—If the accused is known or suspected to be of unsound mind, the procedure described in Part III., Chapter IV., will be adopted.

¹ *Powdrell v. Galloway*, 1904, 7 F. (J.) 9; 4 Adam 432.

² 1908 Act, § 29.

³ P. 175, *infra*.

⁴ § 31, sched. E.

⁵ P. 229, *infra*.

Remitted Cases.—In Courts other than the Sheriff Court, the duty of remitting to a higher Court cases in which the crime charged cannot be tried in the inferior Court, in terms of § 8, must be kept in view; and also the power of remitting those cases which the Court deems more suitable for trial in a higher Court, in terms of § 9.

Adjournment before Pleading.—The power conferred by § 24 to adjourn the case without calling on the accused to plead, will also be borne in mind.

Previous Convictions.—The rules on this subject are discussed separately.

4. *Accused Appears and Pleads Not Guilty*

It is not competent to any person who appears to answer to any complaint, or to any law agent allowed to appear for the accused if absent (in a case in which this is competent),¹ to plead want of due citation or informality in his citation or in the execution thereof.² Where the accused is present at the first calling of the case, the complaint or the substance thereof is read to him. He is thereupon asked to plead in common form.

Objections.—The accused may, prior to pleading, state objections to the competency or relevancy of the complaint or proceedings. No such objections can be allowed at any future diet of the case, unless with the leave of the Court on cause shown.

The principal preliminary objections were explained in Part I., viz. :—

1. Objections to competency.³
2. Objections to relevancy.⁴
3. Pleas in bar of trial.⁵

There appears to be no reason why a Sheriff *ex proprio motu* should not take exception to the relevancy of a complaint. He is not, however, entitled to dismiss the complaint as irrelevant without first allowing the prosecutor to be heard on the question of relevancy.⁶ Where the accused person is represented by a law agent, no review is permitted in respect of such objections, unless these were timeously stated at the trial.⁷ Consequently, it is the law agent's duty to be specially careful that every proper objection to the complaint or proceedings is stated before his client is allowed to plead.

Illustration.—A Summary complaint set forth that the accused, "being the owner or person in charge" of a dangerous dog, was

¹ P. 172, *supra*.

² 1908 Act, § 29.

³ P. 87, *supra*.

⁴ P. 88, *supra*.

⁵ P. 93, *supra*.

⁶ *Waugh v. Paterson*, 1924, J.C. 52.

⁷ 1908 Act, § 75.

liable to be ordered to keep it in control. No objection was taken to the relevancy, and the Sheriff-Substitute pronounced an interlocutor finding that the dog was dangerous and ordering the accused to have it kept under proper control. The accused brought a suspension in which it was maintained that the complaint was irrelevant. The Court repelled the objection to the relevancy in respect that, while it was well founded, it had not been taken in the Sheriff Court. The interlocutor was amended under the powers conferred on the Court by § 75.¹

Objection to Relevancy involving Nullity of the Proceedings.—

The rule that objections to relevancy must be taken timeously is subject to the exception that if the objection arises *ex facie* of the complaint or of the proceedings, and is of such a nature as to make a *funditus* nullity of the proceedings, the Court of Review is bound to take note of it.² The reason for this is that a Court of final appeal will not allow a conviction to stand for what is no crime under the law of Scotland.³

Objections must be noted.—Failure to note objections taken in the course of the proceedings, as provided by § 41, vitiates the whole proceedings.⁴ It is best that the objection be noted in the minutes of procedure, but it does not appear to be incompetent to note it on a separate paper so long as reference is made thereto in the minutes themselves.⁴

It must be remembered that, if the accused is charged as acting in a special capacity, the fact is held as admitted, unless challenged by preliminary objection before the plea is recorded.⁵

Amendment of Complaint.—It is competent at any time prior to the determination of the case, unless the Court see just cause to the contrary, to amend the complaint by deletion, alteration, or addition so as to cure any error or defect therein, or to meet any objections thereto, or to cure any discrepancy or variance between the complaint and the evidence. Any amendment so made is sufficiently authenticated by the initials of the Clerk of Court.⁶ Such amendment must not change the character of the offence charged. If the Court is of opinion that the accused may by such amendment be in any way prejudiced in his defence on the merits of the case, it may grant such remedy to the accused by adjournment or otherwise as to the Court may seem just.⁷

¹ *Walker v. Brander*, 1920, J.C. 20.

⁵ 1908 Act, § 19 (5).

² *O'Malley v. Strathern*, 1920, J.C. 74;

Rogers v. Howman, 1918, J.C. 88.

⁶ See *Sutherland v. Shiach*, 1928, S.N. 81.

³ *Ibid.*, per Lord Mackenzie.

⁴ *Connell v. Mitchell*, 1913, S.C. (J.) 13;

5 Adam 641.

⁷ 1908 Act, § 30.

As a general rule, the question of whether or not an amendment should be allowed is one for the judge who tries the case, and the Court of Review will not lightly interfere with the exercise of his discretion, unless it be shown that the public interest or the interest of the accused is affected.¹

While the powers of amendment under the 1908 Act are extensive, it must not be supposed that it is competent to transform a complaint which is radically defective in essential particulars into a relevant complaint. The Act still retains the provision in § 5 of the 1864 Act, that the amendment must not change the character of the offence charged. Any amendment should be made at the time when it is allowed,² and in such a way that the original form of the complaint can still be seen. Every amendment must be authenticated by the initials of the Clerk of Court.

Illustrations.—After the Sheriff had commenced to give judgment, and intimated his intention to find the charge not proven in respect of a defect in the complaint, the prosecutor asked leave to amend the complaint, but this was refused. On appeal, opinion expressed that the motion for amendment came too late.³

In a prosecution for deforcement and assault, it was discovered after the prosecutor's case was closed that the offence had been committed on 8th December instead of 8th November. An amendment was allowed, deleting the word "November" and substituting the word "December." The accused was offered an adjournment, of which he declined to avail himself. Held that the amendment was competent, as the accused suffered no prejudice thereby.⁴

In a prosecution under the Salmon Fisheries Act, 1868, the locus had been accidentally omitted in the complaint, and the omission was not discovered until the case for the prosecution was closed. The prosecutor was allowed to amend the complaint by inserting a locus. Held that the amendment was incompetent. Lord Justice-Clerk Moncreiff said: "However wide the power of amendment under the Summary Procedure Act may be, it cannot extend to the essential requisites of a criminal charge."⁵

The locus was omitted and an amendment was allowed supplying locus. This was held incompetent. Lord McLaren said: "Now, to remedy a defect does not mean to transform into a libel what never was a libel." Lord Justice-Clerk Moncreiff said: "In my opinion the specification of locus is so essential that without such specification there is no complaint. It is not a defective allegation, it is the want

¹ *Cumming v. Frame*, 1909, S.C. (J.) 56; 6 Adam 57.

⁴ *Matheson v. Ross*, 1885, 12 R. (J.) 40; 5 Coup. 582.

² *Owens v. Calderwood*, 1869, 7 M. 556; 1 Coup. 217.

⁵ *Stevenson v. M'Levy*, 1879, 6 R. (J.) 33; 4 Coup. 196.

³ *Henderson v. Callendar*, 1878, 4 Coup. 120.

of an allegation of any kind." Lord Craighill, in referring to the powers of amendment under § 5 of the 1864 Act, said : " The words of that clause undoubtedly are very broad, and given jurisdiction there is hardly any amendment which might not be held to be covered by this enactment. But the implication of the clause is that jurisdiction has been disclosed, and it is only upon this assumption that, as I think, the power, or rather the duty, to amend, when that is required, is made applicable, or is rendered competent to the judge."¹

It has been held incompetent to amend the instance by adding the concurrence of the Procurator-Fiscal after the case was in Court.²

It has been held competent to amend a complaint by adding the heading, " Under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887."³

A complaint under the Salmon Fisheries Acts charged the accused with two offences under two different sections of these Acts. The prayer of the complaint only asked the Court to convict of " the aforesaid contravention." In the course of the proof for the prosecution, objection was taken that, while two distinct contraventions were charged, the Court was only asked to convict " of the aforesaid contravention." A motion by the prosecutor to amend the complaint by adding the letter " s " to the word contravention refused, and the accused assoilzied. On appeal, held that the amendment should have been allowed.⁴

Abandonment of Proceedings.—A prosecutor sometimes finds it necessary to abandon proceedings after a complaint has been served. This abandonment may be carried out in various ways, but it is important to notice the effects of each method, as some infer merely a temporary abandonment of the proceedings while in others the result is that the charge itself is abandoned and proceedings finally dropped.

Where the Prosecutor serves a Fresh Complaint and does not proceed with the Original Complaint.—The prosecutor may find after serving his complaint that there is an error in it rendering it undesirable to proceed further with it. In such a case the simplest course is to serve a fresh complaint, preferably for a new diet, and intimate to the accused at the time of service that the complaint previously served will not be proceeded with, and that he does not require to attend at the diet fixed for the hearing of that complaint. That diet will not be called, the legal effect being that the particular

¹ *Macintosh v. Metcalfe*, 1886, 13 R. (J.) 96; 1 White 218.

² *Lundie v. MacBrayne*, 1894, 1 Adam 342.

³ *Finlayson v. Bunbury*, 1898, 25 R. (J.) 110; 2 Adam 478.

⁴ *Macrorie v. Crawford*, 1906, 8 F. (J.) 83; 5 Adam 32.

instance drops. It would in such a case be open for the accused to attend the diet to which he was cited on the first complaint and ask the Court to call the case, and it would be in the power of the Court to do so ; but it is hardly conceivable that in such circumstances a Court would insist on the diet being called. If the Court did so insist, the prosecutor could then move to desert the diet *pro loco et tempore* ; and if this motion were granted, the accused would be in no better position than formerly. It is competent for the Court to refuse a motion for desertion of the diet *pro loco et tempore*, and at its own hand desert the diet *simpliciter*. This would certainly be a very extreme course to take ; but even if taken, there is authority for the view that it would not bar the prosecutor from instituting a fresh complaint.¹

Assuming that the accused makes no attempt to press for the calling of the diet fixed on the first complaint, and appears at the diet fixed on the second complaint, no further procedure in regard to the first complaint is necessary. The instance has fallen and the complaint itself is at an end. It might, however, happen that the diet fixed for the second complaint was the same as that originally fixed for the first. In such a case the only complaint the diet in which would be called and to which the accused would be asked to plead would be the second. The effect would, therefore, be the same as that originally mentioned : the instance in the first complaint would fall, and the complaint itself be at an end. In such a case, however, if the accused desired it, there could be no objection to the prosecutor minuting on the second complaint that the first complaint had been abandoned.

Illustration.—The accused was, on 5th March 1900, charged in the Police Court with assault, and remitted to the Sheriff ; but, the Procurator-Fiscal having declined to take up the case, he was on 6th March (having meantime been in prison) again brought up before the Police Court on a second complaint libelling the same charge, and having pled not guilty the case was adjourned to 13th March. On that date, on his attending for trial, this complaint was not proceeded with, and he was asked to plead to a third complaint charging the same crime of assault, but aggravated by a previous conviction. To this complaint he pled not guilty, and evidence both for the prosecution and defence was led. He was convicted, and presented a suspension, which was refused. Lord Justice-Clerk Macdonald said : “ At the adjourned diet on 13th March, the prosecutor allowed the previous complaint to drop, and the suspender was asked to plead to a third complaint. All this was quite competent. The same course is followed in all our criminal tribunals, from the most summary up to the highest Court in the country. It is always in the power of the public prosecutor to depart

¹ *H.M. Adv. v. Hall*, 1881, 8 R. (J.) 52 ; 4 Coup. 500.

from one libel and proceed to charge the accused upon a fresh libel. In the higher Courts the *induciæ* must be allowed to run anew in each case, but in the case of a Summary complaint there are no *inducia*. But in neither case is any record made of the dropping of the old libel.”¹

Where Prosecutor forbears to call the Complaint.—To refrain from calling the case is also a convenient mode of dropping the complaint when it is ascertained that, owing to the absence of an important witness or owing to the illness of the accused himself, it is impossible to proceed at the diet originally fixed. Where necessary, intimation should be given as early as possible to the accused that his attendance at the diet originally fixed will not be required. It must, however, be carefully kept in view that the effect of not calling the diet is to bring that particular complaint to an end, and that no further procedure upon it is thereafter competent. If further proceedings are to be taken, a new complaint must be prepared and served.

Where Prosecutor moves the Court to Desert the Diet *pro loco et tempore*.—This form of procedure is applicable when the accused appears and objections to the relevancy of the complaint are sustained, or when, after the accused has appeared and pled not guilty, it is found impracticable to proceed at that diet—owing to the unexpected absence of a material witness or other cause. Although there is no decision exactly on the point, it is thought that, on the analogy of jury trial, the right of the prosecutor to desert the diet *pro loco et tempore* ceases after he has begun to lead his evidence *in causa*. The same rule as is applicable to the diet being not called is applicable to a desertion of the diet *pro loco et tempore*: the particular complaint is at an end, and further proceedings must be instituted afresh.

Illustration.—In proceedings in a Police Court the diet was deserted *pro loco et tempore*. A warrant of apprehension of accused was subsequently written on the original complaint, and he was convicted and sentenced on that complaint. Held that the procedure was illegal, and conviction suspended. Lord Justice-Clerk Moncreiff said: “I have always understood, and I believe it is in accordance with the universal practice, that to desert a diet *pro loco et tempore* puts an end to the libel; but, unlike a desertion *simpliciter*, leaves the prosecutor able to defend himself against a plea of *res judicata*, and to bring a new complaint charging the same offence.”²

It sometimes happens that a case is called and the accused

¹ *Cochran v. Walker*, 1900, 2 F. (J.) 52; 3 Adam 165.

² *Collins v. Lang*, 1887, 15 R. (J.) 7; 1 White 482.

fails to appear in answer to his citation, and for various reasons it is undesirable to take advantage of any of the provisions in § 33 of the Act. What should be done in such a case? It is competent to desert the diet *pro loco et tempore*,¹ but this procedure is not suitable in a case where the accused does not appear. It would also be competent for the Court, on the motion of the prosecutor, to grant leave to withdraw the complaint, and this would leave it quite open for the prosecutor to serve a fresh complaint. A simple course, in such a case—if, indeed, any record of the proceedings is necessary at all—is to minute on the complaint that the diet has been called and that the accused has failed to appear. Any further proceedings on that complaint would, of course, be at an end.

Desertion of the Diet *simpliciter*.—Where the prosecutor intends to drop, not merely the complaint, but any further proceedings in the case, he moves the Court to desert the diet *simpliciter*, and this has the effect of completely discharging the accused from any further proceedings on the charge libelled.²

Remitted Cases.—In the Justice of Peace, Burgh, and Police Courts, it is necessary to keep in mind those cases which have to be remitted to a higher Court, whether in terms of § 8, in consequence of their exceeding the powers of trial of the inferior Court, or in terms of § 9, in respect that the Court deems them more suitable for trial in a higher Court.

Adjournment before Pleading.—The Court, in order to allow time for inquiry or for any other necessary cause, may, without calling on the accused to plead to any charge against him, continue the case for such reasonable time as may in the circumstances be necessary, not exceeding seven days, or, on special cause shown, fourteen days, from the date of apprehension. The accused may be liberated on bail, or committed to prison with or without bail; but no judge can allow bail in a case which he is not competent to try.³ In the larger burghs it is a common practice to bring persons accused of serious crimes before the Police Court immediately on apprehension. When this is done, the Court may adjourn in virtue of § 24, but cannot allow bail.

Pleading.—All objections to the complaint or proceedings having been taken and disposed of, and the various other points which have been mentioned duly considered, the accused person is asked to plead guilty or not guilty. The procedure where he tenders a plea of guilty, which is accepted by the prosecutor, has been already

¹ *Morrison*, 1854, 1 Irv. 599.

³ 1908 Act, § 24.

² *H.M. Adv. v. Hall*, p. 98, *supra*.

explained.¹ It only remains to consider the procedure where he pleads not guilty to the charge, or guilty to a part only thereof, and the prosecutor does not accept the partial plea.²

Adjournment of Trial.—Apart from statute, there is a right inherent at common law to every judge to adjourn a trial when he thinks there is just cause for doing so. A motion for adjournment is an appeal to the discretion of the judge, and the High Court will interfere only if the power is oppressively used.³ When the accused person has been brought up on short notice, and asks an adjournment for a reasonable cause, the motion should always be granted.⁴ But the cause of application must be reasonable and material. A common ground for asking an adjournment is the absence of a witness. When a motion is made on this ground, the judge should ask the person making it what facts he proposes to prove by the absent witness and grant the motion only if he is satisfied that such evidence is relevant and material.⁵

It must never be forgotten that every adjournment in a criminal trial must be to a specified time and place.⁶ An adjournment “to a future date,” or “to a date to be afterwards fixed,” is illegal. It follows from this that there must always be a minute of adjournment written upon the complaint, and signed by the judge or the Clerk of Court.⁷ No minute or record is needed where the Court rises for luncheon.⁸

By Statute.—When the accused person pleads not guilty, either party may move for an adjournment, and it will be granted if the Court judges it expedient to do so.⁹ The matter is one for the discretion of the Court.¹⁰ Where the accused person has been cited to appear, a note should be attached to his citation informing him whether the prosecutor intends to proceed to trial at the first diet, or to adjourn the case for trial at a subsequent diet (schedule D.).

The Court, in adjourning a case for trial, must fix as early a diet as is consistent with the just interests of both parties.¹¹ Where the accused person has not already got a copy of the complaint, the prosecutor must furnish him with one, if desired by him.¹² This will usually occur where the accused person has been apprehended, because a citation is always annexed to a full copy of the complaint.

¹ P. 174, *supra*.

² 1908 Act, § 32.

³ *Bruce v. Linton*, 1861, 23 D. 85; *Robertson v. Duke of Atholl*, 1869, 1 Coup. 348; 8 M. 57; *Haining v. Milroy*, 1893, 31 S.L.R. 50; 1 Adam 86.

⁴ *Ferguson v. M'Nab*, 1884, 11 R. (J.) 63; 5 Coup. 471.

⁵ *Haining v. Milroy*, *supra*.

⁶ *H.M. Adv. v. Fraser*, 1852, 1 Irv. 1;

Corstorphine v. Jameson, 1910, S.C. (J.) 21; 6 Adam 154.

⁷ *Craig v. Tarras*, 1897, 24 R. (J.) 88; 2 Adam 344.

⁸ *Tocher v. H.M. Adv.*, 1927, J.C. 63.

⁹ 1908 Act, § 32 (1).

¹⁰ *Mackie v. Crombie*, 1926, J.C. 29, *per* L.J.C. Alness at 32.

¹¹ 1908 Act, § 32 (2).

¹² *Ibid*.

Where the accused is brought before the Court by apprehension he is entitled to an adjournment of the case for not less than forty-eight hours, provided that the request for such adjournment is made before the prosecutor has commenced his proof. The Court must inform the accused of his right to such adjournment. The case may proceed to trial at once, or on a shorter adjournment than forty-eight hours, if the Court considers this is necessary to secure the examination of witnesses who otherwise would not be available.¹ An absolute duty is laid upon the judge to inform the accused person in these circumstances of his right to an adjournment, when he pleads not guilty.

Where the accused is in custody, he may be committed to prison either without bail or until he finds sufficient bail to appear at such adjourned diet and at all future diets of the case, and the amount of such bail must be fixed in the minute of adjournment. The Court may in any case where it judges it expedient, and whether or not the accused is in custody, instead of fixing bail, appoint the accused to attend at such adjourned diet under a penalty, not exceeding £10, in case he shall fail to appear.²

The Court may from time to time, and at any stage of the case, on the motion of either party, or *ex proprio motu*, grant such adjournments as may be necessary for the proper conduct of the case.³

Illustration.—An accused, who had not been apprehended, was cited to appear in the Police Court on a charge of contravening the Street Betting Act, 1906. Attached to the citation, which was served upon the accused more than forty-eight hours before the time appointed for the trial, was a copy of the complaint and a note informing him that the case would proceed at the hour specified unless an adjournment was granted. After the first witness for the prosecution had been examined, the accused, who conducted his own defence, asked for an adjournment in order that he might instruct a law agent. His application was refused by the magistrates. In a stated case it was held that § 32 (6) was not imperative, but merely conferred on the Court a discretion to grant or refuse an adjournment; and that the magistrates had properly exercised their discretion in respect that the accused had had ample time before the diet to instruct a law agent, and in any event that he should have applied for an adjournment before the trial began.

Principles on which Discretion should be Exercised.—The true criterion is the interests of the accused. An adjournment should be granted if there is a risk of the accused suffering prejudice by his not being informed of his rights or where irregularities in procedure have occurred which have prevented the accused from having a full

¹ 1908 Act, § 32 (3).

³ *Ibid.* § 32 (6).

² *Ibid.* § 32 (4) and (5).

opportunity to prepare his defence. But there must be some risk of substantial injustice, and an accused will not be allowed to escape by invoking some merely technical irregularity.¹

Young Persons and Other Special Cases.—While in ordinary circumstances the intimation of a right to adjournment is only applicable after a plea of not guilty is tendered, there may be cases in which, owing to the age and circumstances of the accused or the serious nature of the offence, he should, before being asked to plead, be offered an adjournment in order to permit of his having legal advice as to the plea which he should tender. Each case must depend on its own circumstances, but the guiding principle in all should be to see that every one brought before a Court of justice is treated with justice.

Illustrations.—A girl of ten years of age went with her mother to the City Clothes Market, Glasgow, and shortly after was found in possession of some articles which were missing from the stalls. A policeman was called, and at his request mother and child accompanied him to the police office, where some inquiries were made. No charge was then notified to them, and they were allowed to go home, but warned to attend at the police office on the following morning. The same night a police officer called at their house and again warned them to attend. On the following day mother and child attended at the police office, when they were both placed at the bar on a charge of theft, to which they pled not guilty. No intimation was given them of any right to an adjournment, although no complaint had been previously served upon them. The woman was convicted and sentenced to thirty days' imprisonment, and the child was ordered to be sent to an industrial school for five years. Prior to the charge in question no charge inferring dishonest appropriation of property had ever been preferred against either mother or child. The Court quashed both the conviction and the order sending the child to an industrial school, and in doing so made some strong comments on the procedure in the case. Lord Trayner said: "I think the proceedings complained of, as set forth by the complainer, were not merely oppressive, but lawless—that is, they were not in accordance with, but were opposed to, the principles

¹ 1908 Act, § 75.

The following decisions prior to the 1908 Act may be referred to. Convictions suspended:—

Pyper v. Walker, 1885, 12 R. (J.) 47; 5 Coup. 631.

Gardner v. Jones, 1890, 17 R. (J.) 13;

2 White 474.

Mackellar v. Dickson, 1898, 25 R. (J.) 63; 2 Adam 504.

Reid v. Neilson, 1898, 25 R. (J.) 82;

2 Adam 546.

Massey v. Lamb, 1906, 8 F. (J.) 88;

5 Adam 59.

Suspensions refused:—

Boyce v. Shaw, 1891, 19 R. (J.) 13;

3 White 73.

Spowart v. Burr, 1895, 22 R. (J.) 30;

1 Adam 539.

and practice of criminal law known and recognised in the law of Scotland." The Lord Justice-Clerk Macdonald said: "I hold proceedings to be null in which I find that in their initiation there was an absolute disregard of the commonest principles of justice by springing suddenly, at the very moment of the trial, a charge of serious crime against a person who up to that time had not been given the slightest notice that she was to be under accusation as a criminal at all, but on the contrary was, as I think, directly led to understand that she was only brought there as guardian of a child."¹

The accused, a lad of eighteen, who had not been previously convicted of any crime inferring dishonesty, was apprehended without a warrant, brought before the Police Court the same morning, and "remanded" for forty-eight hours. Before the expiry of that period he was served with a complaint under the Summary Jurisdiction Acts, the complaint being served between 1 and 2 A.M. of the day after his apprehension. He was brought to the bar on this complaint, pled not guilty, and was convicted on evidence on the same day, within about eight hours of the service of the complaint. He was not informed of his right to an adjournment. He alleged that he was under the belief that, under the remand for forty-eight hours, he would not be again brought up before the Court until the expiry of that period, and that his friends were relying on this interval to prepare his defence. It appeared that the reason for the case being disposed of before the expiry of the remand was that an important witness for the prosecution would not otherwise have been available. The conviction was suspended on the ground that in the circumstances the proceedings amounted to oppression in the legal sense of the word, and that the accused should have been informed of his right to an adjournment.²

A girl, aged fifteen years, who had not been previously convicted, was apprehended on a charge of theft, and after trial was convicted and sentenced to imprisonment for thirty days. Previous to the trial she did not see, and was afforded no opportunity of seeing, either her parents or anyone to assist her in preparing her defence, and at the trial the magistrate did not inform her of her right to an adjournment, but at once called on her to plead. In a suspension the conviction was quashed. The Lord Justice-Clerk observed: "This is one of those cases in which action which may be legitimate in general circumstances becomes illegitimate in particular cases, and it is the duty of the Court to protect the public against children being brought up in this way, suddenly and without any warning, and tried at once without an opportunity being given to them to prepare their defence."³

¹ *Mackenzie v. M'Phee*, 1889, 16 R. (J.) 53; 2 White 188.

³ *M'Ginness v. Neilson*, 1910, S.C. (J.) 58; 6 Adam 221.

² *Reid v. Neilson*, 1898, 25 R. (J.) 82; 2 Adam 546.

First and Second Diets Expedient.—While it may not be practicable in Summary Procedure to have in every case a pleading diet and an adjourned diet for trial, it is in the majority of cases the usual practice to adopt this course, and the form applicable to citation in schedule D. for notifying the accused as to whether his case is or is not to proceed to trial at the first diet is suited for the intimation of double diets. The advantage of having two diets is that it renders unnecessary the attendance at the first diet of witnesses either for the prosecution or defence; and if any questions of relevancy are to be raised it permits of these being discussed and disposed of prior to the case on the merits being entered into, and thus obviates expense to both parties should objections to the relevancy be sustained. There may be cases where it is necessary or expedient to arrange for trial at the first diet—as, for example, where evidence either for the prosecution or defence would otherwise be lost, or where the residence of the accused is at a distance from the Court, and the prosecutor knows or expects that a plea of not guilty is to be tendered. In such a case it might be a hardship to the accused to require his attendance at two diets, and the form of notice intimating to him that the case is to proceed to trial at the first diet is applicable in such circumstances. It is desirable that the officer who serves the complaint should draw the attention of the accused to the note appended to the service copy of the complaint; and when in terms of this note intimation is given that the case is to proceed to trial at the first diet, the officer should point out to the accused that he will require to have any witnesses for the defence in attendance on the date fixed. He may also inform the accused that unless he hears from him to the contrary by a certain date he will assume he is to plead not guilty, and that witnesses for the prosecution will be cited. This gives the accused an opportunity of considering as to his plea, and of intimating a plea of guilty if he so desires.

While the minimum *induciae* for citation is forty-eight hours, it is in many cases desirable that this should be increased. An *induciae* of from five to seven days between service and the first diet where that is a pleading diet, and an *induciae* of from seven to ten days between service and the first diet where the case is to proceed to trial at the first diet, may be suggested as suitable in the majority of cases. The interval between the first and second diets will naturally depend partly on the arrangements of the Court and partly on the convenience of the parties to the case. Where an accused person intends to plead not guilty, but cannot without much inconvenience attend the pleading diet, advantage may, by arrangement, be taken of the provisions of § 33 of the Act, dealing with procedure where the accused fails to appear, and the case be adjourned to a future diet, of which intimation will be given to the accused. The same course can be taken when, from any cause, it has been arranged

to postpone the diet of trial. In such matters a prosecutor should always keep in view, not only what may be convenient for the prosecution, but what is reasonably necessary in the interests of the accused.

When the accused is in custody, the question as to whether or not it is expedient to go to trial at the first diet must be one of circumstances. If the witnesses both for the prosecution and defence are in attendance, it may be in the interests of both parties that the case should be at once disposed of; but in many cases an adjournment will be necessary, and judges and Clerks of Court must keep specially in view the obligation which the statute imposes upon them of informing the accused of his right to an adjournment of forty-eight hours. Failure to do so will, in all probability, result in a conviction being set aside, and it is doubtful whether even the provisions in § 75 of the Act, saving convictions being quashed on merely technical grounds, would be sufficient to protect a conviction where an important statutory provision designed for the protection of the accused had not been observed.

Alibi.—If the accused intends to found on a plea of *alibi*, he is bound to give notice thereof to the prosecutor, with particulars as to time and place, and of the witnesses by whom it is proposed to prove it, prior to the examination of the first witness for the prosecution. The prosecutor, on such notice being given, and if he so desires, is entitled to an adjournment of the case.¹

It need hardly be said that an accused person is entitled to get from the prosecutor such information as to time and place as will enable him to state an *alibi* if this is his defence. Unless in certain special cases, the hours within which an offence was committed are not mentioned in a complaint; but this may be important for the defence of *alibi*, and should be at once furnished if applied for.

Where there are two diets, and the accused is represented by a law agent at the first diet, notice should be given by such law agent at that diet. Where the accused has not professional assistance, and there is any reason to think that his defence may be founded on the plea of *alibi*, the Clerk of Court might point out to him that, if this is his defence, notice requires to be given; and if such a defence is then stated, the Clerk should note particulars as to time and place and the witnesses, by which it is proposed to establish the defence. Where the accused is brought before the Court by apprehension, and there is any reason to anticipate such a defence, the like course might be followed. In such a case an adjournment would generally be necessary to permit of evidence in support of the *alibi* being led, and also to permit of the prosecutor rebutting that evidence if necessary. A case may also be conceived where the accused, in

¹ 1908 Act, § 35.

ignorance of the legal provisions relative to notice of *alibi*, omits to give the necessary notice, and begins to lead proof in support of that plea after the evidence for the prosecution has been closed. In such a case the prosecutor might, apparently, in view of the provisions of the statute, object to the evidence being led, but the expediency of such a course is open to grave doubt. One of two courses, it is suggested, might in such circumstances be adopted by the prosecutor —(1) to allow the evidence to be led, trusting to the *alibi* being upset by cross-examination if it is false ; or (2) to allow the accused, before proceeding further with his evidence, to furnish particulars of his *alibi* in the same way as if notice had been timeously given, and then to move the Court to adjourn the case to a future diet, reserving to the prosecutor the right to lead further evidence at that diet if so advised. If, in the interests of the accused, it was important that the evidence of the witnesses in support of his *alibi* should be taken at once, this, by virtue of the provisions of § 32 of the Act, might be done, and the case then adjourned with a view to further evidence being led both for the prosecution and defence.

The course first suggested is that which, it is thought, might in the majority of cases be adopted, especially as it would apparently be competent for the Court, on the authority of the case of *Collison*,¹ to recall any of the witnesses for the prosecution and put to them any questions bearing on the *alibi*. There may, however, be cases, especially where the offence charged is one of a more or less serious nature, in which the prosecutor would not feel justified in dispensing with the notice to which he is by statute entitled, and in such a case it is thought that the alternative procedure above suggested would be competent. It is doubtless not in strict accordance with the general principle that the prosecutor cannot lead additional evidence after his case has been closed ; but on the other hand, if the accused by failure to observe a condition which the Act imposes on him has prevented the prosecutor from being in a position to lead additional evidence, it seems only reasonable that, if the prosecutor is to waive his objection to want of timeous notice, he should be placed as nearly as possible in the same position as if the requisite statutory notice had been given. Until, however, the point has been raised and decided by the High Court, each prosecutor must exercise his own discretion in such circumstances as to the course which it is expedient to follow.

The statute does not provide the particular form in which notice is to be given. Of course, the best and most appropriate form is in writing, and where the accused is represented by a law agent formal notice of this nature may be expected, but a prosecutor must not be too critical in such matters. If, for example, the accused informed a police officer of the nature and particulars of his *alibi*, that should,

¹ *Collison v. Mitchell*, 1897, 24 R. (J.) 52 ; 2 Adam 277.

it is thought, be held sufficient notice. The Act does not apparently contemplate that the notice of *alibi* is to form part of the process, or be noted in the record.

5. PREVIOUS CONVICTIONS

The rules applicable to previous convictions have been fully considered.¹ Some special provisions, however, made by the 1908 Act, have to be mentioned here.²

Where the accused has been previously convicted of any offence forming an aggravation of the offence with which he is charged, such previous conviction is set forth in a list annexed to the complaint ; and—

- (1) If a plea of guilty is tendered, the judge or Clerk of Court asks the accused if he admits the correctness of such conviction and of its application to him. If such admission is made, the plea is held to be a plea of guilty as libelled, and is recorded in manner already mentioned.
- (2) If the accused pleads not guilty to the charge and is subsequently convicted thereof, the judge or the Clerk of Court, after conviction, asks the accused whether he admits the previous conviction or convictions libelled. If such admission is made, the fact is recorded.
- (3) It is not necessary for the prosecutor to produce extracts of any conviction so admitted.
- (4) Where the accused does not admit any conviction so libelled, the prosecutor, unless he withdraws such conviction, must adduce evidence in proof thereof, either at the first diet or at any adjourned diet.
- (5) A conviction or an extract conviction of any offence committed in any part of the United Kingdom, bearing to be under the hand of the officer in use to give out such extract conviction, is received in evidence, without being sworn to by witnesses. An official of any prison in which the accused may have been confined on such conviction is a competent and sufficient witness to prove the application thereof to the person accused, although he may not have been present in Court at the trial to which such conviction relates. This provision is without prejudice to any other competent mode of proving a conviction and the application thereof to the accused. Where in any Court a book of record is kept of the convictions in said Court containing the like particulars as are inserted in an extract conviction, and where at the end of each day's proceedings the entries

¹ P. 111, *supra*.

² § 34.

in such book are certified as correct by the judge or Clerk of Court, such entries in any proceedings in such Court are to be accepted as evidence of such convictions.

Illustration.—The only evidence led to apply a previous conviction to an accused was that of a single witness, a police constable, who was not an official of the prison in which the accused had been confined, and had not been present in Court when the accused was convicted. It was held that the evidence was insufficient in law to prove the application of the previous conviction to the accused. It was pointed out that the witness tendered by the prosecution to prove a previous conviction must fulfil the statutory requirements, and that except in the case of such a witness there was no relaxation of the ordinary rules of evidence.¹

- (6) Where the accused is convicted of any offence, and also of any aggravation by previous conviction, and is again accused of any offence in regard to which such conviction may be competently used as an aggravation, the production of the prior conviction, or an extract thereof, setting forth the particulars of the previous convictions therein libelled, is admissible and sufficient as evidence to prove against the accused all the previous convictions and aggravations therein set forth.
- (7) Previous convictions of an offence under any statute or order may be libelled as aggravations in any subsequent charge for the same kind of offence or any analogous offence. A conviction in any part of the United Kingdom of any offence inferring dishonesty may be libelled as an aggravation of any offence inferring dishonest appropriation of property or attempt thereat. A conviction of any offence inferring disorderly conduct or a breach of public order may be libelled as an aggravation of any other offence inferring disorderly conduct or a breach of public order.
- (8) Nothing contained in the foregoing enactments prevents evidence of previous convictions being led *in causa*, where such evidence is competent in support of a substantive charge.

Illustration.—The Street Betting Act, 1906, which prohibits betting in public places, imposes a certain penalty for a first offence and a larger penalty for a second offence. A complaint charged an accused with a contravention of the Act, and that “such offence is a second offence, you having been previously convicted as in the list annexed, whereby you are liable” to the larger penalty. The accused contended that as the previous conviction was stated against

¹ *M'Dermott v. Stewart's Trs.*, 1918, J.C. 25.

him in the complaint it had to be proved before the case for the prosecution was closed. The Court rejected this view on the ground that the previous conviction was not libelled as a substantive charge, but as an aggravation rendering the accused liable to heavier punishment.¹

It will be observed that the law in regard to the admission and proof of previous convictions, in procedure both on Indictment and Summary complaint, is put practically on the same footing. An accused person is first to be asked whether he admits the particular charge against him. If he does so and previous convictions are libelled, he is then to be asked whether he admits these previous convictions. If he does, the plea is held to be one of guilty as libelled. It is unnecessary to minute separately the plea of guilty and the admission of the previous convictions. The one plea covers both. If the accused pleads not guilty to the charge, the charge has first to be established by evidence; and if the accused is found guilty, he is then to be asked whether he admits the previous convictions libelled; if he does, this is to be minuted, and the simplest method of doing so will be to add to the finding of the Court a finding that the previous convictions are admitted or proved, as the case may be. If the accused denies any previous conviction libelled, proof of such conviction must be led, unless withdrawn by the prosecutor. Such proof may be either at the first diet of the case, at the diet of trial, or at any adjourned diet. It is most essential, in view of these provisions, that great care be taken to set forth accurately the previous convictions with which the accused is charged, and to ascertain whether or not he admits their correctness. This may often with advantage be done by an officer of police going over with him beforehand the convictions libelled, and thus giving him an opportunity of challenging the accuracy of any of them. This will not obviate the necessity of their being distinctly put to him by the Court, but will greatly facilitate the procedure; and if the accused has either been served with a copy of the complaint or has had an opportunity of perusing it before coming into Court, the provisions of the statute would, it is thought, be sufficiently complied with by his being asked whether he has perused the list of previous convictions against him and is satisfied that it is correct. In the majority of cases the previous convictions will likely be admitted, but if evidence is necessary, a conviction may be proved either by production of the principal conviction or an extract, or a record book of Court, or a police register in cases to which § 502 of the Burgh Police Act, 1892, applies. Of course, in each case oral testimony will be necessary that the particular conviction libelled applies to the accused, and in view of the decision in *M'Dermott*

¹ *Campbell v. Kerr*, 1912, S.C. (J.) 10; 6 Adam 550. Cf. *Hefferan v. Wright*, 1911, S.C. (J.) 20; 6 Adam 321. See p. 61, *supra*.

v. *Stewart's Trs.*¹ care must be taken to ensure that the witness fulfils the statutory requirements. The accused should also get every facility for leading evidence to show that the conviction does not apply to him. In addition to the provisions of § 34, it must be kept in mind that the conviction of an individual representative of a company, association, or incorporation is deemed to be the offence of such corporate body, and a conviction thereof may be libelled as an aggravation of any subsequent offence of the same nature by the same incorporation, although the individuals charged and convicted are different.² But it is not competent to libel a conviction against a company charged in its corporate capacity as an aggravation of a later charge against the same company when charged through an individual representative.³

It will be observed that a conviction in a Summary Court is not only evidence of that particular conviction, but also of any other previous convictions libelled and which are admitted or proved. It is therefore desirable that a Clerk of Court issuing an extract of a conviction in a Summary Court should schedule any such previous convictions. He should only do so, however, when he is in a position to satisfy himself by the examination of principal convictions or extracts that the convictions are correctly libelled, as it is quite possible that convictions which are substantially accurate may have been admitted by the accused, and yet may contain trifling errors of dates, etc.⁴

Where a judge considers a previous conviction, he should look at the conviction and the sentence alone and should not take into account the details that led thereto.⁵

6. CONDUCT OF THE TRIAL

The actual conduct of the trial in a Summary case is similar to that in Solemn Jurisdiction,⁶ except that there is no jury and, therefore, no charge. The evidence for the prosecution is led first, but in exceptional circumstances if the accused is likely to lose the benefit of the evidence of certain witnesses through delay or other reason as may happen, for example, in maritime causes, witnesses for the defence may be called before the case for the prosecution is closed.⁷ When the case for the prosecution is once closed, it is incompetent for the prosecutor to lead further evidence in support of the complaint.⁸ It is, however, permissible for the judge, *ex proprio motu*, at any time to recall a

¹ *Supra*.

² 1908 Act, 28 (2) (c).

³ P. 146, *supra*.

⁴ *Campbell v. Macpherson*, 1911, S.C. (J.) 33; 6 Adam 394.

⁵ *Connell v. Mitchell*, 1909, S.C. (J.) 13; 5 Adam 64.

⁶ P. 95 *sq.*, *supra*.

⁷ 1908 Act, § 32 (8).

⁸ *Docherty v. M'Lennan*, 1912, S.C. (J.) 102; 6 Adam 700.

witness.¹ The prosecutor himself is not a competent witness.² Once the case for the prosecution is closed the accused leads what evidence he thinks fit. The accused may give evidence on his own behalf.³ At the conclusion of the case for the defence, the prosecutor addresses the Court. He is not entitled to comment on the fact that the accused or his wife or husband, as the case may be, has not given evidence.⁴ The accused or his agent next addresses the Court. Thereafter the Court pronounces its finding. If the finding be one of guilty the accused must be given the opportunity of addressing the Court before sentence is pronounced.⁵

The topic of evidence in criminal cases is dealt with in a subsequent chapter,⁶ and it must be kept in mind that there are some special provisions enacted by the 1908 Act for use in Summary cases.⁷

There are a number of cases where irregularities or mistakes in conducting the actual trial have come before the High Court. These cases are of a miscellaneous character and may be grouped here.

It is quite incompetent for any proceedings in a criminal trial to go on outwith the presence of the accused,⁸ except, of course, in the cases above mentioned where trial is competent in the accused's absence. So where a man was charged with assault it was held a good ground for suspending the conviction that the magistrates had examined the victim's bruises outwith the accused's presence.⁹ Nor should a judge examine a *locus* outwith the presence of the parties.¹⁰ It is incompetent to seek information from a party present in Court who has not been tendered as a witness.¹¹ Where a witness in giving evidence referred to certain notes in his possession it was held that the judge was bound to allow the accused to see them.¹²

¹ *Collison v. Mitchell*, 1897, 24 R. (J.) 52; 2 Adam 277; *Saunders v. Paterson*, 1905, 7 F. (J.) 58; 4 Adam 568.

² *Graham v. M'Lennan*, 1911, S.C. (J.) 16; 6 Adam 315.

³ P. 268, *infra*.

⁴ P. 268, *infra*.

⁵ *Ewart v. Strathern*, 1924, J.C. 45.

⁶ Part III., Chapter III.

⁷ *Ibid.*, at p. 281.

⁸ *Aitken v. Wood*, 1921, J.C. 84.

⁹ *Ibid.*

¹⁰ *Sime v. Linton*, 1897, 24 R. (J.) 70.

¹¹ *Leavack v. Macleod*, 1913, S.C. (J.) 51; 2 Adam 562.

¹² *Niven v. Hart*, 1898, 25 R. (J.) 89; 2 Adam 562.

CHAPTER IV

DISPOSAL OF CASE

THE determination of the Court as to the guilt of the accused is termed the finding.

1. *Acquittal*

There are two findings of the Court which result in acquittal. The Court may either find the accused not guilty or find the charge not proven.

There is also a statutory right to acquittal under the 1908 Act. In the trial of any case in a Court consisting of more than one judge, if the judges are equally divided in opinion as to the guilt of the accused, the accused must be found not guilty of the charge or part thereof on which such division of opinion exists.¹

2. *Conviction*

The finding which results in conviction is one of guilty. There must be a finding of guilty before sentence is passed.² If the Court finds only part of the charge proved, the finding must be specific as to the extent to which the accused is found guilty. A conviction of part of a charge implies dismissal of the rest of the complaint.³

The Form of Findings and Sentence.—The finding and sentence and orders of Court, both as regards offences at common law and under any statute or order, are minuted in the forms contained in schedule E. The schedule must be followed strictly.⁴ The Act is sufficient warrant for all execution thereon, and for the Clerk of Court to issue extracts containing such executive clauses as may be necessary for implement thereof. When imprisonment forms part of any sentence or other judgment, warrant for the apprehension and interim detention of the accused pending his being committed to prison is, where necessary, implied.⁵

Where a penalty is paid at the bar it is not necessary for the

¹ 1908 Act, § 40.

² 1908 Act, § 58.

³ *Sharp v. Todd*, 1892, 19 R. (J.) 47; ⁴ *Paterson v. M'Lennan*, 1914, S.C. 3 White 154; *Muirhead v. M'Intosh*, (J.) 123; 7 Adam 428.

1890, 2 White 473.

⁵ *Ibid.* § 53.

Court to refer to the period of imprisonment applicable to the non-payment thereof.¹

Where several charges at common law or under any statute or order are embraced in one complaint, a *cumulo* penalty may be imposed in respect of all or any of such charges of which the accused is convicted.² This provision dispenses with the necessity of specifying a separate penalty for each offence.

Illustration.—A complaint charged an accused (1) with theft of whisky, and (2) with a contravention of the Licensing (Scotland) Act, 1903, § 70, for which the penalty prescribed by the statute is a fine not exceeding forty shillings, and, failing payment, imprisonment for a period not exceeding thirty days. The accused was found guilty as libelled and sentenced to thirty days' imprisonment. In a suspension it was held that the sentence was bad in respect that, *quoad* the statutory offence, it was disconform to the statute in that it did not give the alternative of a fine.³ The decision in this case proceeded on certain earlier cases in which it had been held that a conviction is bad altogether, in the case of an offence punishable by statutory penalty, if it does not impose the penalty.⁴

A sentence following on a conviction may be framed so as to take effect on the expiry of any previous sentence which at the date of such conviction the accused is undergoing.⁵

This last provision is applicable to a case in which, while an accused person is in prison undergoing sentence, it is found necessary to proceed against him on a charge which has subsequently come to the knowledge of the prosecutor, and which from any cause it would be impracticable or inexpedient to delay disposing of until his liberation. In such a case the accused may be brought up for trial, and if convicted his sentence is made to date from the expiry of the previous sentence which he is then undergoing. An extract of the conviction will be furnished to the prison authorities, and on the expiry of the previous sentence he will be detained on the subsequent conviction and sentence.

Every sentence, unless where otherwise provided for, must be pronounced in open Court in presence of the accused; but it is not necessary that such sentence be written out or signed in his presence. It is competent, at any time before imprisonment has followed on a sentence, for the Court to require the attendance of the accused, and to alter or modify such sentence; but no higher sentence than that originally pronounced is competent. The

¹ 1908 Act, § 53.

² *Ibid.*

³ *M'Lauchlan v. Davidson*, 1921, J.C. 45.

⁴ *Ibid.*, per L.J.G. Clyde at 48. The

cases followed were *Gardner v. Dymock*, 1865, 5 Irv. 13; *Fraser v. Neilson*, 1903, 5 F. (J.) 51; 4 Adam 139; *Black v. Claxton*, 1906, 8 F. (J.) 69; 5 Adam 101.

⁵ 1908 Act, § 53.

signature of the judge or Clerk of Court to any sentence is sufficient also to authenticate the findings on which it proceeds.¹

Looking, however, to the short forms of sentence provided, there should be no practical difficulty in at once minuting the sentence imposed. Prior to the 1908 Act undue delay in this respect was fatal to a conviction, and there seems no reason why it should not be fatal now.² The power conferred by this section to modify a sentence is one which must be exercised with care. It is intended to meet the case of circumstances coming under the notice of the judge, either immediately or shortly after the case has been disposed of, which, if they had been within his knowledge at the time when he pronounced sentence, would have led to his imposing a smaller sentence. Such a modification is only competent prior to imprisonment having followed on the sentence. Where it is exercised, the accused's attendance at the bar should be again required. The judge should explain to him the reason which has led him to modify the sentence. The original sentence should then be cancelled and initialled by the judge or Clerk of Court, and a fresh minute of sentence written out.

It will be observed that under this section the signature of the judge or Clerk of Court to the sentence authenticates the findings on which the sentence proceeds, so that it is unnecessary that these findings should be separately signed.³

It is competent to correct any error in the minutes of procedure, or in the extract of any sentence or order, at any time prior to execution thereon. Such correction is authenticated by the initials of the Clerk of Court.⁴

This power of correction must be exercised with caution. It is merely meant to enable the Court to put right any minor clerical error which is discovered in the minutes or extract.

Illustration.—A Police Court conviction and sentence to pay a fine were erroneously recorded in the minutes of Court as of date 21st September, whereas the real date was 23rd September. The accused paid the fine on the same day. A few days thereafter the date was altered, the figure 23rd being written on the top of the figure 21st, and the alteration verified by the initials of the Clerk of Court. It was held that as the sentence had been carried into effect before the alteration was made, the alteration was bad. The sentence was quashed as the Court were of opinion that matter was one of substance and not of form and that § 75 could not be invoked.⁵

When such an error is observed, no attempt to erase it should be made. The pen should be drawn through the erroneous entry

¹ 1908 Act, § 54.

⁴ *Ibid.* § 55.

² *MacLennan v. Duncan*, 1902, 4 F. (J.) 38; 3 Adam 545.

⁵ *Smith v. Sempill*, 1911, S.C. (J.) 30; 6 Adam 348.

³ *Ibid.* § 54.

and the corrected entry inserted, the alteration being initialled by the judge or Clerk of Court.

Illustration.—Two accused persons were convicted, but the warrant of imprisonment was to convey “him” to prison. This had afterwards been altered to “them” and was not authenticated. Held fatal. Lord Justice-Clerk Macdonald said: “I wish also to make this observation: that while a mistake of this kind may be corrected within a reasonable time and before effect has been given to the conviction, I do not think it right that a magistrate or clerk should tamper in any way with a conviction after it has been executed. But where such an alteration is permissible, it must be an above-board proceeding and properly authenticated. To turn one word into another word in a covert manner, so as materially to affect a judgment or warrant, can never be justifiable.”¹ So where a mistake had been made in a sentence, and to remedy it a correct sentence was pasted on the top of the original, the conviction was suspended.²

Where imprisonment is authorised, an extract of the finding and sentence in the form contained in schedule E. is a sufficient warrant for the apprehension and commitment of the accused. No such extract is void, or liable to be set aside, on account of any error or defect in point of form.³ The forms of extract given in the schedule meet all ordinary contingencies, and sufficiently explain themselves.

In any proceedings in a Court consisting of more than one judge, the signature of one judge is sufficient in all warrants or other proceedings prior or subsequent to conviction, although the presence and signature of two or more judges may be necessary to conviction of the offence in respect of which such warrants are granted or procedure takes place. It is not necessary that the judge so signing shall be one of the judges trying or dealing with the case otherwise.⁴ This applies to the Justice of Peace, Burgh, and Police Courts. The power of the Clerk of Court to sign sentences (§ 16) must be kept in view.

The power conferred by the 1887 Act, in certain cases, of finding the accused guilty of a crime different from that with which he is charged has been extended to Summary Procedure.⁵ The provisions of the 1887 Act⁶ with regard to procedure where more than one crime is charged or where an accused charged with committing a crime is found guilty of attempt merely,⁷ or where an accused charged with a statutory offence is convicted of a common law crime⁸ apply to Summary Procedure.⁹

¹ *Reid v. Miller*, 1899, 1 F. (J.) 89;

⁵ *Ibid.* § 5.

³ Adam 29.

⁶ 1887 Act, § 60.

² *Dunsire v. Bell*, 1909, S.C. (J.) 25;

⁷ *Ibid.* § 61.

⁵ Adam 625.

⁸ *Ibid.* § 62.

³ *Ibid.* § 56.

⁹ P. 107 *sq.*, *supra*.

⁴ *Ibid.* § 57.

Duties of Clerks.—In view of the power given to the Court of Review by § 75 of the 1908 Act to amend sentences in cases where there has been a mere technical irregularity, there is a danger that the care and precision required by the former law be departed from. The fact, however, that the procedure has been simplified and that a slight irregularity need not invalidate a conviction does not absolve criminal officials of their responsibilities.

Illustration.—In a trial in the Police Court neither the Clerk of Court nor his depute was present, their place being filled by a junior clerk, who had no written authority to act as Clerk of Court. Held that, in the absence of specific averments of a miscarriage of justice this was not sufficient to set aside the conviction; but important observations were made by Lord Pearson as to the duties of Clerks of Court in such cases. His Lordship, in referring to the importance of having the responsible Clerk of Court present on such occasions, said: "In acting without this safeguard I think that all concerned incur a serious responsibility in the event of a miscarriage of justice arising from the properly appointed Clerk of Court not being present during the proceedings."¹

Alternative Findings.—Where a complaint contains alternative charges a general conviction may be fatal, and great care has to be taken both in pronouncing findings and in minuting a conviction to ensure that no doubt can exist as to the charge or charges of which the accused is convicted. But before a general conviction on alternative charges can be held fatal it must be shown that the charges are truly alternatives in the sense that they are mutually exclusive. This does not depend merely on the language used, and the use of the word "or" does not necessarily mean that the charges are truly alternative.² The test is whether an accused charged under the complaint can be guilty of all the charges libelled.³ If so, there is no objection to a general conviction. If he could not be guilty of all, on account of their being mutually exclusive, a general conviction is bad.

Illustrations.—The Street Betting Act, 1906, makes it an offence to loiter "in streets or public places" for betting purposes, and gives a separate definition of a street and of a public place. A summary complaint charged an accused with loitering for the purpose of betting in a certain place described, "being a 'street' or 'public place' within the meaning of the Act." The accused was found guilty as libelled, but the Court quashed the conviction on the ground that the conviction was general, while the charge was alternative as to

¹ *Stewart v. Macdonald*, 1901, 4 F. (J.) 20; 3 Adam 532.

³ *M'Culloch v. Rae*, 1915, S.C. (J.) 43; 7 Adam 602.

² *Stenhouse v. Dykes*, 1908, S.C. (J.) 61; 5 Adam 553.

locality.¹ Lord Justice-Clerk Macdonald said : “ There are cases, and we had one ² this morning, in which it was held that although certain things stated are coupled by the word ‘ or,’ that does not necessarily mean that they are alternative in the sense that there can only be a conviction definitely of one of the things which are stated, but that there may be a conviction of the offence charged, there being only one statutory offence, which may be committed in various ways, it being indifferent in which way it is committed. But that is not the case we have here. This is a case in which the alternative is between different kinds of place, and the statute . . . has given specific and careful definitions of two different classes of places.”

A husband and wife were charged with keeping a dwelling-house as a gaming or betting house, or having the care or management thereof, or acting in conducting gaming or betting therein, contrary to the Burgh Police Act, 1892. They were found guilty as libelled. It was held that the convictions were not open to the objection of being general convictions on alternative charges, in respect that the charges were not mutually exclusive. Lord Justice-General Strathclyde said : “ The charges made in the complaint although separated from one another by the small conjunction ‘ or,’ are not in reality proper alternatives. The test I apply is this : Could a man accused under this Indictment be guilty of all the charges libelled ? I answer without hesitation that he could. They are not mutually exclusive.” ³

¹ *Lang v. Walker*, 1910, S.C. (J.) 41 ; 6 Adam 180.

² His Lordship was referring to *Wilson v. Renton*, 1910, S.C. (J.) 32 ; 6 Adam

166, where the Court held that the charges were not alternative.

³ *M'Culloch v. Rae*, 1915, S.C. (J.) 43 ; 7 Adam 602.

CHAPTER V

REVIEW

ONE of the principal objects of the 1908 Act was to furnish a uniform method of obtaining review of the judgments of all Courts of Summary Criminal Jurisdiction. This object was sought to be attained, not by abolishing the methods of review formerly competent, but by providing a single method, so complete and convenient that it would be universally adopted in preference to those already existing.

There are six methods, in accordance with which the proceedings of Inferior Courts may be more or less fully submitted to review :—

- (1) Appeal to the High Court of Justiciary on a Stated Case.
- (2) Appeal to the High Court of Justiciary on Circuit under the Heritable Jurisdictions (Scotland) Act, 1746.
- (3) Suspension.
- (4) Appeal to Quarter Sessions of the Peace.
- (5) Appeal to the Court of Session as Court of Exchequer.
- (6) Advocation.

(1) *Review by Stated Case*

Review by stated case was introduced by the 1875 Act, and was adopted and amended by the 1908 Act as a uniform method of appeal.

On the final determination¹ of any cause, either party to the cause may, notwithstanding any provision in any statute excluding review, make application to the Court to state a case for the opinion of the High Court. On such application being made, the Inferior Court, subject to the conditions hereinafter mentioned, is bound to state a case for such opinion.²

The provisions of the 1908 Act regulating appeals are, subject to the provisions of the statute, without prejudice to any other mode of appeal competent.³

1. Grounds on which Review by Stated Case may be Sought.—It is competent to appeal to, and to bring under the review of, the High Court of Justiciary by stated case—

- (1) The relevancy of the complaint ;
- (2) Any irregularity in procedure ;

¹ See *Lee v. Lasswade Local Authority*, 1883, 11 R. (J.) 1 ; 5 Coup. 329 ; *Torrance v. Miller*, 1892, 19 R. (J.) 85 ; 3 White 254.

² 1908 Act, § 60.

³ § 76.

- (3) Any alleged error of the Court in point of law ; and
- (4) Generally any matter which may at present be competently reviewed by suspension, advocacy, or appeal under the Heritable Jurisdictions (Scotland) Act, 1746, or otherwise.¹

As the word "cause" means and includes every proceeding brought under the 1908 Act (§ 2), these provisions are universally applicable. The difficult question, which formerly arose, as to whether the jurisdiction in a case was civil or criminal, is thus avoided. The competency of appeal is settled by the fact that the proceedings have been brought under the 1908 Act.

The grounds of appeal are so varied as to cover every question which is likely to be submitted to review. Under the 1875 Act it was only permissible to plead as a ground of appeal that the determination of the inferior judge was erroneous in point of law ; but this did not cover many points which arose, in regard to alleged irregularities of procedure, or questions of relevancy, which had not been raised in the Inferior Court, and which had not therefore been determined by the judge. Refusal to admit or reject evidence is a good ground for bringing a stated case.² The effect of an improper admission of evidence, where the conviction does not depend on the evidence improperly admitted, has not yet been judicially decided.³

The question whether a conviction is bad as being a general conviction upon alternative charges can be competently raised and decided in a stated case.⁴

It is still incompetent to appeal to the High Court on a question of fact, apart from a question of law applied to such fact, unless in those special statutory cases in which a note of the evidence has been taken in virtue of the Act of Parliament contravened.

What constitutes a question of fact in contradistinction to a question of law is an ever-recurring problem. Its final resolution must turn on the circumstances of each case, but the problem is often rendered more difficult by the failure of inferior magistrates clearly to discriminate between findings which are truly of fact and those which, while sometimes masquerading as findings in fact, are properly legal inferences. The problem is further complicated by the existence of a third category of finding raising a question which is usually described as one of mixed fact and law.

It follows that in preparing a stated case great care must be taken

¹ § 76.

² *E.g.*, *Thomson v. Neilson*, 1900, 3 F. (J.) 3 ; 3 Adam 195.

³ *Waddell v. Kinnaird*, 1922, J.C.

40 ; *cf.* *Brown v. Macpherson*, 1918, J.C. 3.

⁴ *M'Culloch v. Rae*, 1915, S.C. (J.) 43 ; Adam 602. See *Lang v. Walker*, 1910, S.C. (J.) 41 ; 6 Adam 180.

in finding the facts which are proved and in framing a question which raises a question of law.

Illustrations.—In a prosecution under the Food and Drugs Act, 1875, Lord Young made the following important observations bearing on the scope of the Appeals Act of 1875: “It is almost superfluous to say that I assent to the proposition that we will not interfere with a judge’s decision of a question of fact proceeding upon legal evidence only because we think that he ought in the exercise of a sound discretion to have decided otherwise. But the appellant’s case, which it is for him to make out, is that the evidence submitted to the judge is insufficient in law to warrant his decision, or, to express it otherwise, that the facts stated as proved (and which we must assume to have been so) do not, on a right view of the law applicable to them, justify the conviction. If this shall be established to our satisfaction, I think the appeal must be allowed, notwithstanding that the conviction is formally a finding of fact, which indeed every conviction necessarily is.”¹

An accused person was charged with the theft of 3s. worth of oilcake. It appeared that on the occasion in question he had, while intoxicated, called at a shop where he had previously received goods on credit, wishing to purchase the oilcake, and on the shopkeeper declining to give it to him on credit he walked off with it. On a stated case, it was held that in the circumstances there was no felonious intent, and the conviction was quashed.²

An accused person was convicted of a contravention of the Edinburgh Municipal Police Act, 1879, § 261 (having in his possession as or for human food a quantity of unsound butcher meat). He took an appeal under the 1875 Act. In commenting on the fact that one of the questions put to the Court did not raise any question of law, Lord Young said: “Now, in order to entitle a party to apply for a case under the statute he must express his dissatisfaction with the judge’s determination as erroneous in point of law, and state what the nature of his dissatisfaction is. That is, he must point out to the judge the legal error under which he thinks he laboured, and must ask him to state a case setting forth the facts with reference to that legal error. If the judge says, ‘I did not take that view of the law,’ there need be no case. If he says he did take that view, he will honestly state the facts, so that the Court may determine whether he has erred in point of law, or the reverse.”³

An accused person was convicted summarily of theft, and obtained a stated case in regard to the facts, which he maintained did not infer felonious intent. The Court (*dissentiente* Lord Adam)

¹ *Davidson v. M’Leod*, 1877, 5 R. (J.) 1; 3 Coup. 511.

² *Clyne v. Keith*, 1887, 14 R. (J.) 22; 1 White 356.

³ *Dickson v. Linton*, 1888, 15 R. (J.) 76; 2 White 51.

sustained the appeal, although doubts were expressed by Lord Kinnear as to whether the question was not rather one of fact than of law.¹

The question whether a man has deserted his wife so as to render himself liable to conviction under the Poor Law Act, 1845, § 80, is one of fact and not of law.²

In a prosecution under the Merchandise Marks Act, 1887, the question whether or not the accused acted "innocently" is one of fact and not of law. In this case one of the questions put for the opinion of the High Court was in the following terms: "Whether the facts proved warranted a conviction under the Act libelled." Lord Justice-Clerk Macdonald, with reference to the form of this question, said: "It is too common for judges in stating cases to put a question of law in this form, but it is not satisfactory. The question of law is not whether the conviction was 'warranted,' but whether the judge has legally pronounced a conviction on the facts found by him. In other words, did he, in holding that the facts proved justified him in convicting, err in applying the law to these facts? If there was nothing illegal in convicting, the question whether a conviction is warranted or not is one for the judge trying the case."³

In an appeal by a prosecutor against an acquittal in a prosecution under the Sale of Food and Drugs Acts, one of the questions put to the High Court was: "On the facts proved, ought the Sheriff to have convicted the accused?" In commenting on this, Lord Justice-Clerk Macdonald said: "I agree with your Lordships that that is a question which in ordinary circumstances should not be put to this Court. There are cases where the facts and the law are so inextricably mixed that it may be permissible to put the question of law in this shape; as where a statute provides that certain acts shall constitute an offence where done without 'lawful and sufficient' excuse, or in cases where the defence depends on the *bona fides* of the accused. But in this particular case all we have before us is this, that certain evidence was led for the prosecution, partly statutory no doubt, and certain other evidence was led for the defence, and we are asked whether on the whole matter the Sheriff-Substitute has come to a right conclusion. That is not a case in which we have any power to intervene."⁴

The driver of a motor car was charged with driving recklessly and negligently, contrary to the Motor Car Act, 1903, § 1. An appeal against the judgment of a Sheriff-Substitute acquitting him was sustained on the ground that the Sheriff-Substitute had

¹ *Fraser v. Anderson*, 1899, 1 F. (J.) 60; 2 Adam 705.

² *Motion v. M'Fall*, 1899, 1 F. (J.) 85; 3 Adam 21.

³ *Jenkinson v. Neilson Bros.*, 1899, 2 F. (J.) 13; 3 Adam 88.

⁴ *Todd v. Cochrane*, 1901, 3 Adam 357; 9 S.L.T. 59.

misdirected himself upon the legal question of what was sufficient to constitute negligence within the meaning of the Act.¹

The question whether in the sense of § 1 (2) of the Coal Mines Regulation Act, 1908, workmen were or were not working in a shift is one of fact.²

Under the Education Act of 1872, §§ 69 and 60, the question of reasonable excuse to provide efficient elementary education appears to be one of fact.³

The Burgh Police (Scotland) Act, 1892, § 430, empowers "the magistrate" to impose a penalty upon any person who has sold goods, or has made up, or kept, or exposed goods for sale, and who has incorrectly weighed, measured, or numbered such goods, unless such person "shall prove to his satisfaction" that the deficiency has arisen without fraudulent intent. The question of the existence or non-existence of fraudulent intent is entirely one of fact.⁴

Limitations on Right of Appeal.—The appeal, however, is qualified by several important limitations, which prescribe that no conviction, sentence, judgment, Order of Court, or other proceeding whatsoever under the Act,—(a) can be quashed for want of form ; or

(b) Where the accused was represented by a law agent, can be suspended or set aside in respect of any objections to the relevancy of the complaint,⁵ or to the want of specification therein, or to the competency or admission or rejection of evidence at the trial in the Inferior Court, unless such objections have been timeously stated at such trial by the law agent of the accused⁶ ; or

(c) Subject to the provisions contained in §§ 60 and 72, can in any event be quashed, unless on the ground of incompetency or corruption or malice or oppression, or unless the High Court shall be of opinion that the accused has been misled as to the true nature of the charge against him, or been prejudiced in his defence on the merits, and that a miscarriage of justice has resulted thereby.⁷

Before taking an appeal, it is necessary to consider carefully whether the circumstances of the case are such as to render it subject to these limitations. When the only ground of review is an alleged error in point of form or procedure, the appellant requires to satisfy the Court that he has been prejudiced in his defence on the merits, and that a miscarriage of justice has resulted. Irregularities in

¹ *Waight v. Campbell*, 1920, J.C. 1.

² *Roger v. Stevenson*, 1913, S.C. (J.) 30 ; 7 Adam 52.

³ *Gair v. Black*, 1879, 4 Coup. 305 ; *Brown v. Frame*, 1879, 4 Coup. 361 ; *Gillies v. Quigley*, 1905, 8 F. (J.) 1 ; 4 Adam 601 ; but see *Barr v. Smith*, 1903, 5 F. (J.) 24 ; 4 Adam 95.

⁴ *Brander v. Buttercup Dairy Co.*, 1921, J.C. 19.

⁵ *E.g., Dunn v. Mitchell*, 1911, S.C. (J.) 46 ; 6 Adam 365.

⁶ It must be remembered that where the irrelevancy is such as to amount to a fundamental nullity this limitation does not apply. P. 176, *supra*.

⁷ 1908 Act, §-75. See p. 211, *infra*.

procedure must be made the subject of proper questions of law.¹ The circumstances under which a Bill of Suspension is a mode of review preferable to a stated case are considered later.²

2. Form of Procedure and Fees.—A complete course of procedure is prescribed by the 1908 Act ; but provision is made for alterations and amendments, if these should be found necessary. The High Court may from time to time by Act of Adjournal regulate the procedure to be adopted in appeals, and fix the fees to be paid both in the High Court and in the Inferior Courts in connexion with such appeals. Until so regulated, the fees payable in the High Court are those at the commencement of the Act exigible in processes of review, and the fees payable in the Inferior Court for a stated case are those set forth in schedule G.³ Nothing in the 74th section affects the regulations enacted by the Courts of Law Fees (Scotland) Act, 1895.⁴

By Act of Adjournal of 20th March 1909, relative to appeals under the 63rd section of the 1908 Act, the High Court, in pursuance of the powers conferred on them by § 74 of the 1908 Act, enacted that on and after 1st June 1909, no Clerk's fees, Court fees, or other fees or expenses shall be exigible from or awarded against an appellant in custody in respect of an appeal to the High Court against the amount of caution fixed or on account of refusal of liberation by a Court of Summary Jurisdiction.

3. Application for Case.—Application to have a case stated is made either at the time when judgment is given or at any time within five days thereafter. Such application is signed by the appellant or his agent, and either written on the complaint or lodged with the Clerk of Court. Where the latter course is adopted, the Clerk of Court enters in the proceedings the date when the application is lodged. It is also the duty of the Clerk of Court to intimate the appeal to the respondent.⁵

In computing the period of days in appeals under the Act, Sundays and public holidays are not to be included.⁶

It appears desirable that an application for a stated case should be in writing, and that it should be actually lodged before the expiry of the fifth day. The matter was recently considered in *Smith v. Gray*,⁷ where an oral application for a stated case was made immediately after conviction, and was recorded in the minutes of procedure. Subsequently a written application signed by the accused's law agent was posted to the Clerk of Court on the fifth day

¹ *Sutherland v. Shiach*, 1928, S.N. 81.

² P. 218, *infra*.

³ 1908 Act, § 74.

⁴ *Ibid*.

⁵ *Ibid*. § 61.

⁶ *Ibid*. § 71.

⁷ 1925, J.C. 8. See also *Hutton v. Garland*, 1884, 10 R. (J.) 60; 5 Coup. 274; *Charleson v. Duffes*, 1881, 8 R. (J.) 34; 4 Coup. 470.

(excluding the date of conviction) after the conviction. Objection was taken to the competency of the stated case. Lord Justice-Clerk Alness, while thinking it unnecessary to express a concluded opinion on the matter, said that in the circumstances he would be slow to sustain such an objection. Lord Hunter also thought it unnecessary to form a concluded opinion, but expressed the view that there had in the circumstances been substantial compliance with the Act. Lord Anderson, however, in view of the general importance of the topic, expressed his opinion thus: "In order to satisfy the terms of the section, I am of opinion that an application for a stated case must conform to three conditions: (*First*), it must be in writing; (*second*), it must be signed either by the party or by his law agent; and (*third*), it must be made within a period of five days after the date on which judgment was pronounced." His Lordship went on to say that oral application was not sufficient, but in regard to the other matter said: "It was therefore timeously dispatched if not timeously received. It seems to me that the section is to be construed liberally in favour of an accused person who is anxious to have a conviction of which he complains reviewed. So construing it, I have formed the opinion that a written application timeously posted is timeously made in the sense of the Act."

4. Caution.—Immediately on an appeal being taken, the Court usually fixes a sum to be consigned by the appellant, or for which caution is to be found, to meet any penalty and expenses imposed and the expenses of the appeal. The appellant is not entitled to have a case stated unless within five days after the date of his appeal he has made consignation, or found such caution, to the satisfaction of the Clerk of Court, and has also paid the Clerk his fees for preparing the case.¹ The Court below must immediately fix the amount of consignation or caution to enable the appellant to comply timeously with the provisions of the section.² Delay on the part of the Court to fix the amount of caution may amount to oppression.³

The Court has power, in any case where it deems it expedient so to do, to dispense with consignation or the finding of caution.⁴

A person prosecuting in the public interest is not bound to make consignation or to find caution.⁵

Where caution is ordered, it is a condition precedent to a case being obtained that caution be found or consignation made. The power conferred on the Court in its discretion to dispense with caution or consignation may, it is thought, be appropriately exercised in the following circumstances: (1) When, following on a conviction,

¹ 1908 Act, § 62.

³ *Learmonth v. Salmon*, 1926, J.C.

² *Mackintosh v. Wooster*, 1919, J.C. 15; 103.

Greig v. Finlay, 1901, 3 F. (J.) 36;

⁴ 1908 Act, § 62.

³ Adam 316.

⁵ *Ibid.*

it is desired by the prosecutor as well as by the accused to obtain the opinion of the High Court on any legal question which the case raises; (2) when review by suspension would also be open to the accused, as under that form of review he is not bound to find caution for the expenses of the appeal, and it might be more satisfactory for both parties to have the facts set forth in a stated case, instead of having the averments and counter-averments frequent in suspensions. Failure to find caution in the appropriate time is, in the ordinary case, fatal to the appellant.¹ But it is not fatal if the delay be due to the fault of the opposite party.²

Illustrations.—The accused failed to lodge his bond of caution within the three days prescribed by the 1875 Act. The Sheriff declined to state a case, and the High Court held that the period fixed by the Act was peremptory, although Lord Young, in referring to the question whether the Court had power in exceptional cases to grant indulgence, said: "I reserve my opinion until a case of hardship arises."³ In the case of *Thom*,¹ which was referred to in the above case, the bond of caution had not been lodged until the fourth day, but this objection was not stated until the case had been heard on the merits, and the Court held that the objection then came too late.³

In one case the agent for the appellant was prepared to find caution or to make consignment within the three days prescribed by the statute, but neither the magistrate nor Clerk of Court could be found. It was held that in these circumstances the limitations prescribed by the statute could not be held to apply.⁴

5. Interim Liberation.—If the appellant is in custody, the Court may, on consignment being made or caution being found as already mentioned, grant interim liberation on such conditions as to caution or otherwise as the Court may fix, and may grant a sist of execution, or may dispense with further consignment or caution, or may make any other interim order which the justice of the case may require, or may refuse to grant interim liberation. An application for interim liberation must be disposed of by the Court within twenty-four hours after it has been made.⁵

The appellant, if dissatisfied with the amount of caution fixed, or on refusal of liberation, may, within twenty-four hours after the judgment of the Court, appeal thereagainst by a note of appeal written on the complaint and signed by himself or his agent. The complaint and proceedings are thereupon transmitted to the Clerk of

¹ *Thom v. Caledonian Railway Co.*, 1886, 14 R. (J.) 5; 1 White 248; *M'Gregor v. Rose*, 1887, 15 R. (J.) 10; 1 White 477.

² *Mackintosh v. Wooster*, 1919, J.C.

15; *Greig v. Finlay*, 1901, 3 F. (J.) 36; 3 Adam 316.

³ *M'Gregor v. Rose*, *supra*.

⁴ *Greig v. Finlay*, *supra*.

⁵ 1908 Act, § 63.

Justiciary, and the High Court, or any judge thereof, either in Court or in chambers, after hearing parties, has power to review the decision of the Inferior Court, and to grant interim liberation on such conditions as such Court or judge may think fit, or to refuse interim liberation.¹

In the event of the appellant obtaining interim liberation, and thereafter not proceeding with his appeal, the Inferior Court has power to grant warrant to apprehend and imprison him for such period of his sentence as at the date of his liberation remained unexpired, said period to run from the date of his imprisonment under such warrant.² This warrant may be obtained on presenting a Petition in the form contained in schedule F.

6. Consent to Conviction being set aside.—When a mistake has been inadvertently made, of such a nature as to invalidate the conviction, the prosecutor frequently perceives the fatal character of the objection as soon as it is brought under his notice. Formerly there was no way of correcting such an error except by carrying through the whole procedure of an appeal, thus entailing unnecessary expense to both parties. An error of this kind can now be remedied without delay, and at little expense, by virtue of the provisions mentioned in the next paragraph.

Where an appeal has been taken by stated case in terms of the 1908 Act, and the prosecutor, on the appeal being intimated to him, is not prepared to maintain the judgment appealed against, he may by a minute signed by him and written on the complaint, or lodged with the Clerk of Court, consent to the conviction and sentence being set aside, either in whole or in part, and setting forth the grounds on which he is of opinion that the judgment cannot be maintained. He sends a copy of this minute to the appellant. The Clerk of Court thereupon ascertains from the appellant or his agent whether he desires to be heard in the High Court before the appeal is disposed of, and notes on the record whether or not the appellant desires to be heard. He thereafter transmits the complaint and relative proceedings to the Clerk of Justiciary, who lays them before any judge of said Court, either in Court or in chambers. Such judge, after hearing parties, if they desire to be heard, or without hearing parties, may set aside the conviction either in whole or in part, and may award expenses to the appellant not exceeding £3. 3s., or may refuse to set aside the conviction. In the latter case, the proceedings are returned to the Clerk of the Inferior Court. The appellant is then entitled to proceed with his appeal, in the same way as if it had been marked on the date when the complaint and proceedings

¹ 1908 Act, § 63.

² *Ibid.*

are returned to the Clerk of the Inferior Court.¹ The section does not apply to a bill of suspension.²

Where proceedings are taken under the 73rd section, the preparation of the draft stated case is delayed pending the decision of the High Court.³

In one case⁴ of an exceptional character both parties by joint minute concurred in asking the Court to set aside the conviction. In that case a Norwegian subject was convicted on a complaint which set forth a contravention of the Sea Fisheries Act, 1883. The charge turned on the terms of a Convention entered into between Great Britain and certain states, of which Norway was not one, which was incorporated with the Act. The Sheriff-Substitute convicted. The accused brought a stated case. A joint minute was presented to the Court in which the parties concurred in asking that the conviction be set aside. Counsel for the respondent stated that as the complaint was based on the Convention to which Norway was not a signatory, they did not submit any argument in support of the conviction. The Lord Justice-Clerk said : " The parties have sought by joint minute to have the conviction set aside. It is, however, our duty when a judgment has been pronounced by any competent Court not to set the conviction aside except upon satisfactory grounds of law, and we cannot simply give effect to the joint minute without hearing argument against the conviction which is brought under review." The Court sustained the appeal and quashed the conviction.

7. Preparation of Stated Case.—The Clerk of Court, within ten days from the application for a stated case, or, when consignation or caution is ordered, within five days from the date when consignation has been made or caution found as already explained, prepares a draft stated case. Within said period he sends the draft to the appellant or his agent, and a duplicate thereof to the respondent or his agent. Such case is in the form contained in schedule H. It sets forth the particulars of any matters competent for review which the appellant desires to bring under the review of the High Court, and of the facts, if any, proved in the case, and any point of law decided, and the grounds of the decision.⁵ In practice, the stated case is frequently drafted by the law agent of the appellant.

If the parties or their agents fail, within one month after the draft case has been sent to them, to agree on the terms of the case, these are settled by the judge against whose judgment the appeal is taken. In any event the terms of the case are subject to the approval of such judge.⁶

¹ 1908 Act, § 73.

⁴ *Thorsen v. Wilson*, 1912, S.C. (J.) 3.

² *Loudon v. Torrance*, 1916, S.C. (J.)

⁵ 1908 Act, § 64.

42; 7 Adam 762.

³ 1908 Act, § 73.

⁶ *Ibid.*

It is the duty of the Clerk of Court, if the case is not adjusted by the parties within one month after it is sent to them, to insist on its being laid before the judge of the Inferior Court in order that its terms may be settled by him.

It is usual to print the stated case, and to annex to it as an appendix a print of the complaint, record of proceedings, minutes of conviction and sentence, and any documentary productions to which the appellant specially wishes to refer.

The stated case ought to set out fully the facts proved. It is improper merely to narrate what the witnesses said, as the Inferior Court must form its own view of the evidence and state the effect of the evidence in the stated case.¹

It has also been held an improper practice for a Sheriff-Substitute to omit findings of fact in the stated case proper and to refer to his annexed judgment which contained findings in fact and law.²

Even where the controversy between the parties is confined to some particular point, as, for example, the admission or rejection of a particular line of evidence, the stated case should narrate the facts fully, and should not be confined merely to the questions and answers which were the subject of objection.³

8. Transmission to High Court.—On the case being adjusted, and signed by the judge against whose judgment the appeal is taken, the Clerk of Court sends it to the appellant, and also transmits the complaint, productions, and other proceedings in the cause, including the notes of evidence, if any, to the Clerk of Justiciary.⁴

On the case being lodged with the Clerk of Justiciary, the appellant is held to have abandoned any other mode of appeal which might otherwise have been open to him.⁵

9. Intimation to Respondent.—The appellant, within five days after receiving the case, sends a copy of it to the respondent, and within the same time transmits the case by post to, or causes it to be lodged with, the Clerk of Justiciary, together with a certificate under the hand of himself or his law agent of intimation having been made to the respondent.⁶

When the stated case and proceedings have been printed, a few of the prints are usually sent to the respondent or his law agent.

Under the corresponding section (3) of the 1875 Act, it was held

¹ *Gordon v. Hansen*, 1914, S.C. (J.) 131; 7 Adam 441; *Falconer v. Brown*, 1893, 21 R. (J.) 1; 1 Adam 96; *Stenhouse v. Dykes*, 1908, S.C. (J.) 61; 5 Adam 553; *Coulthard v. Mackenzie*, 1879, 6 R. 1322.

² *Mackenna v. Dunn*, 1918, 55 S.L.R. 622.

³ *Waddell v. Kinnaird*, 1922, J.C. 40.

⁴ 1908 Act, § 66.

⁵ *Ibid.* § 69.

⁶ *Ibid.* § 67.

that notice of appeal sent to the agent of the respondent was not sufficient.¹

It is desirable that the case should reach the hands of the Clerk of Justiciary within the five days. The principle applied in the question of timeous application for a stated case seems also applicable to the transmission of the copy of the case to the respondent.²

10. Abandonment of Appeal.—The appellant may at any time prior to lodging the case with the Clerk of Justiciary abandon his appeal by minute signed by himself or his agent, written on the complaint, or lodged with the Clerk of Court, and intimated to the respondent. Such abandonment is without prejudice to any other mode of appeal, review, advocacy, or suspension competent.³ As soon as the case has been lodged with the Clerk of Justiciary, every other method of appeal is barred.⁴

11. Record.—On an appeal being taken, the Clerk of Court records on the complaint the different steps of procedure in the appeal. Such record is held as evidence of the dates on which the various steps of procedure took place. This is a most useful provision, as it prevents any dispute as to whether the several steps of procedure have been timeously taken. In appeals the forms of procedure are in accordance with schedule H.⁵

12. Powers of High Court.—The case is heard by the High Court on such date as may be fixed by that Court.⁶

The High Court have power—

- (a) To affirm, reverse, or amend the determination of the Inferior Court ; or
- (b) To impose a fine instead of imprisonment, where imprisonment has been awarded ; or
- (c) To reduce the period of imprisonment ; or
- (d) To reduce any fine imposed by the Inferior Court ; or
- (e) To remit the case back to the Inferior Court to be amended, and thereafter, on the case being amended and returned, to deliver judgment thereon ; or
- (f) To remit the case to the Inferior Court with their opinion thereon.⁷

Where an appeal against an acquittal is sustained, the High Court may either convict and sentence the accused or may remit the case to the Inferior Court with instructions to convict and

¹ *Niddrie and Benhar Coal Company v. Young*, 1895, 22 R. 413 ; 32 S.L.R. 303.

² P. 205, *supra*.

³ 1908 Act, § 68.

⁴ *Ibid.* § 69.

⁵ *Ibid.* § 70.

⁶ *Ibid.* § 72.

⁷ *Ibid.*

sentence the accused, who is bound to attend any diet fixed by such Court for this purpose.¹

The High Court may amend any conviction, sentence, judgment, Order of Court, or other proceeding, or may pronounce such other sentence, judgment, or order as they shall judge expedient.²

The High Court may remit to any fit person to inquire and report in regard to the facts and circumstances of any cause under appeal, and on considering such report may pronounce judgment.³

Where the appellant has been granted interim liberation, whether his appeal is under the 1908 Act or otherwise, he must appear personally in Court on the day or days fixed for the hearing of his appeal. If he fails to appear, unless the Court on cause shown permits the appeal to be heard, he is held to have abandoned it. In the event of the appeal being dismissed or refused in whole or in part, the High Court have power to grant warrant to apprehend and imprison such person for any term, to run from the date of his imprisonment, not longer than the period which at the date of his liberation remained unexpired of the term of imprisonment specified in the sentence brought under review.⁴

In considering the powers of the High Court it is necessary to keep in view the important limitations defined by the 75th section of the 1908 Act. The special virtue of this section is that irregularities which, prior to its enactment, might have resulted in the escape of the accused altogether are not now fatal. Where the irregularity is not such as to be fatal, the High Court may amend the sentence.

Amendment of Sentence.—A number of cases have arisen where a sentence in excess of the legal maximum has been imposed by the Inferior Court⁵ and where a sentence appropriate to a second offence has been imposed for a first offence.⁶

Illustration.—The Licensing (Scotland) Act, 1903, enacts that in the case of any person trafficking in exciseable liquors without a certificate, the penalty shall be for the first offence a sum not exceeding £50 with expenses, and for subsequent offences a sum not exceeding £100 with expenses. An accused person against whom there was no previous conviction was duly convicted and fined £100 without expenses. The sentence was recalled and the accused was of new sentenced to a fine of £50 with expenses. Lord Salvesen said: "As to whether we can amend a conviction by reducing the fine, I am clearly of opinion that § 75 of the 1908 Act applies, and that we have such power. I think that section was passed in order to remedy the previous state of the law, which went so far as to

¹ 1908 Act, § 72.

² *Ibid.* § 70.

³ *Ibid.* § 72.

⁴ *Ibid.*

⁵ *Whellans v. Hilson*, 1910, S.C. (J.) 1; 6 Adam 129; *Hall v. Macpherson*, 1913, S.C. (J.) 100; 7 Adam 173.

⁶ *M'Cluskey v. Boyd*, 1916, S.C. (J.) 31; 7 Adam 742.

quash a conviction because a fine of less amount than ought to have been imposed had been imposed upon an accused; and it was just to get rid of questions of that kind that powers were conferred upon us of correcting a sentence. There is no better reason for our intervening to reduce a fine than that the Court has exceeded its powers in imposing a fine—exceeded them, I mean, as regards amount. I think it would wholly defeat the intention of § 75 if we held that the section only applied to what was entirely within the powers and competency of the Inferior Court.”¹

The view has been expressed that where an Inferior Court imposes a fine which is in amount within its competence, the High Court will not interfere, unless in the circumstances the amount of the fine goes so far as oppression.² But in a recent case³ where the maximum penalty of £100 was imposed in a first offence, the High Court reduced the penalty to £25. Where a Sheriff-Substitute in passing sentence on an accused convicted of assault stated that if the accused reappeared before him again on a similar charge, he would impose six months’ imprisonment, and did in fact do so when the same accused pleaded guilty to a charge of assault seven months later, the Court restricted the sentence.⁴

Other examples of the power of the Court to deal with sentences may be mentioned. A summary complaint under the Dogs Act, 1871, craved an order on the accused to keep a dog under proper control. The interlocutor making the required order was defective in respect that it did not contain a finding that the accused was the owner of the dog. The Court, in virtue of § 75, ordered the necessary amendment and refused to suspend the conviction.

It has been observed, however, that where a person holding a licence under the Motor Car Act, 1903, has been convicted of an offence under § 1 of that Act, the Sheriff is bound to order endorsement of the licence, and that it is not within the power of the High Court on appeal, standing the conviction, to alter the sentence by ordering the removal of the endorsement. The ground of the decision was that as the Sheriff was bound to order endorsement, the High Court could not disobey the law and order its deletion.⁵

Where an accused was sentenced to thirty days’ imprisonment in circumstances under which he ought to have had the option of a fine, the High Court pronounced an appropriate sentence.⁶

Convictions quashed *simpliciter*.—There are, however, cases which are inappropriate for treatment under § 75. Section 75 can be

¹ *M’Cluskey v. Boyd*, 1916, S.C. (J.) 31; 7 Adam 742.

⁴ *Neil v. Stevenson*, 1920, J.C. 15.

⁵ *Cromwell v. Renton*, 1911, S.C. (J.)

² *Ibid.*, per Lord Salvesen—*Kean v. Bell*, 1910, S.C. (J.) 13; 6 Adam 192.

86; 6 Adam 498.

³ *Girgawy v. Strathern*, 1925, J.C. 31.

⁶ *M’Lauchlan v. Davidson*, 1921, J.C. 45.

invoked where an accused has been properly convicted, but is inapplicable where the conviction is itself improper. In the latter case, that the accused has been in fact guilty of some other offence for which he might justly be punished does not justify the Court of Review in inflicting punishment.

Illustration.—A bookmaker was tried on a complaint charging him with sending by post cards containing invitationsto bet “contrary to” certain specified sections of the Betting Act, 1853, which deal with the offence of owning, occupying, or advertising betting houses, and certain sections of the Betting Act, 1874, which deal with the offence of inviting to bet. He was found “guilty as libelled.” The Court quashed the conviction in respect that the sections of the Betting Act, 1853, libelled were not directed against the offence set forth in the complaint but against entirely different offences. Lord Justice-General Dunedin said: “Here we have the accused found guilty as libelled, that is to say, he is convicted of all and sundry of the offences, some of which, we find, there was no ground of convicting him of at all. If we amended the sentence here we should be retrying the case for ourselves, because we cannot tell what the views of the Court were when he was convicted of something of which he ought not to have been convicted at all.”¹

An accused was convicted and sentenced on a charge of assaulting a constable when engaged in the execution of his duty, contrary to § 12 of the Prevention of Crimes Act, 1871. On appeal, the High Court held that at the time the constable was not in the execution of his duty, and consequently that the accused had not been guilty of the statutory offences charged. The prosecutor argued that under § 75 the Court had power to find the accused guilty of an assault at common law, and sentence him accordingly. The Court held that the case was inappropriate for the application of § 75.

Remits to Inferior Court to amend Case.—This course has been very frequently adopted by the High Court, and the undernoted cases may be taken as illustrations.²

13. Appeal against Acquittal.—A stated case may be competently used for an appeal against an acquittal.³

Illustration.—A motor car driver was charged under the Motor Car Act, 1903, with reckless and negligent driving, and convicted. An appeal was sustained on the ground that the Sheriff-Substitute had misdirected himself on the legal ground of what was sufficient to constitute negligence within the meaning of the Act.⁴

¹ *Lipsey v. Mackintosh*, 1913, S.C. (J.) 104; 7 Adam 182.

³ *Wagh v. Campbell*, 1920, J.C. 1.

² *Ewart v. Strathern*, 1924, J.C. 45; *Girgaw v. Strathern*, 1925, J.C. 31.

⁴ *Ibid.*

(2) *Appeal to Circuit Court*

This form of review is almost unknown in practice, as the necessity for it is removed by the procedure by stated case, or Bill of Suspension. It was part of the machinery introduced by the Heritable Jurisdictions (Scotland) Act, 1746,¹ which was passed in the year following the rebellion of 1745, with the object of breaking the power of the Highland chiefs and feudal superiors.² It was made permanent as to appeals by 31 Geo. II. c. 42.

1. Competency.—This method of review applies to both common law and statutory offences, but is in practice, on the rare occasions when it is used, confined to the latter. There would appear to be little scope for this mode of appeal except in very rare cases where other modes are specifically barred. Even in such extreme circumstances a Bill of Suspension would probably be competent. As a general rule all points which can be raised in this process can be raised in an appeal on a stated case, so that it is virtually superseded.

Appeal may be taken from the Sheriff and Burgh Courts, both on common law and statutory offences, and from the Justice of Peace Courts in cases under statutes which prescribe appeal in this manner.

Appeal is competent against any judgment concerning matters criminal, of whatever nature or extent the same may be, except a judgment in a case inferring the loss of life, or an interlocutor before final judgment.³

The appeal is taken to the next Circuit Court of Justiciary held in the circuit wherein is situated the territory of the Court which pronounced the judgment, provided the Circuit Court is held at least fifteen days after service of the appeal.⁴ In the Home District, appeals are taken to the High Court at Edinburgh. Appeals from Shetland may be brought to the Inverness Circuit.⁵ The additional Circuit Courts established by Order in Council dated 18th May 1881, and relative Act of Adjournal, have the same jurisdiction in appeals as ordinary Circuit Courts.⁶ No appeals can be taken to Glasgow Winter Circuit.⁷

In proceedings at common law, or under statutes which contain no express limitation, appeal is competent in respect of errors in fact, or in law, or of fundamental nullities. There can be no appeal on the merits, unless the Act contravened makes provision for a record of the evidence being preserved.⁸

¹ 20 Geo. II. c. 43.

² Hume ii. 516.

³ 1746 Act, § 34; *List v. Pirie*, 1867, 6 M. 185, 1867; 5 Irv. 559.

⁴ 1746 Act, § 34.

⁵ *Walker*, 1870, 1 Coup. 466.

⁶ *Sinclair v. Holliss*, 1881, 9 R. (J.) 1; 4 Coup. 518.

⁷ *Davidson*, 1844, 2 Broun 13; *Macenzie v. M'Phee*, 1888, 16 R. (J.) 43; 2 White 167.

⁸ *Wright v. Bowers*, 1875, 3 Coup. 99.

2. Notice of Appeal.—Any party conceiving himself aggrieved by a judgment may appeal, either (1) in open Court at the time of pronouncing judgment¹; (2) at any time within ten days thereafter²; or (3) at any time during the appellant's imprisonment under the sentence appealed against, or within ten days from the date of his liberation.³ In the last case, the imprisonment must have commenced within ten days after the sentence was pronounced. Appeal is taken by a written minute, and a formal appeal is lodged within the prescribed period.⁴

3. Caution.—The appellant must lodge with the Clerk of Court a bond with a sufficient cautioner, (a) that he will answer and abide by the judgment of the Circuit Court; and (b) that he will pay the costs, if any are awarded.⁵ The Clerk marks the date of lodging of the bond, and writes a certificate either beneath the minute of appeal or upon the separate appeal lodged by the appellant.

4. Interim Liberation.—The appellant, if imprisoned under the judgment, or threatened with imprisonment, may obtain interim liberation, or a sist of execution, either by presenting a separate Petition to the High Court or by adding a crave to the prayer of the appeal. If liberated, he must personally attend the Appeal Court.

5. Intimation to Respondent.—The appellant or his agent serves the respondent with a duplicate of the appeal.⁶ If the appeal contains any conclusion against the inferior judge, the appellant serves a duplicate upon him, in the same manner.⁷ The service must, in both cases, be made within the period allowed for taking an appeal, and at least fifteen days before the Circuit Court.⁸ The day of service or date of the Court is counted, but not both.⁹ The appeal is served, even though it has been taken in open Court.¹⁰ Any officer of law may serve the appeal.¹¹ Service is usually proved by an acceptance of service written on the appeal, holograph of the respondent or his agent.

6. Transmission to Circuit Court.—The appellant lodges the appeal, the original complaint, the judgment appealed against, the

¹ *Anderson v. Jameson*, 1872, 2 Coup. 359.

² *Christie v. Gauld*, 1874, 2 Coup. 560; 1746 Act, § 34.

³ 1908 Act, § 76.

⁴ 1746 Act, § 34.

⁵ *Ibid.* § 36.

⁶ *Ibid.* § 34; *Wyllie*, 1863, 4 Irv. 441.

⁷ 1746 Act, § 34.

⁸ *Ibid.*

⁹ *M' Ritchie*, 1847, Ark. 270.

¹⁰ *Gall*, 1857, 2 Irv. 704.

¹¹ 1908 Act, § 76.

bond of caution, the certificate of service, and any other papers in the hands of the Circuit Clerk, so soon as the Circuit Court meets. If no appearance is made for the appellant, the respondent may crave protestation and dismissal of the appeal with expenses.¹

7. Withdrawing Appeal.—The appellant may withdraw his appeal by written minute, at any time before the papers have been lodged with the Circuit Clerk of Justiciary.

8. Powers of Circuit Court.—The Court hears counsel for the parties first on any objections to the competency of the appeal, and then on the merits. Where the appellant has been granted interim liberation, he must appear personally under the same conditions as were explained in regard to a stated case. The Court has practically the same powers as in a suspension.² In cases of difficulty, it may certify the proceedings to the High Court.³ The Court awards expenses as it thinks proper.⁴ The setting aside of convictions is subject to the limitations prescribed by the 1908 Act, § 75.

(3) *Suspension*

1. Competency. — The proper function of suspension is the setting aside of an improper warrant granted, or a defective judgment pronounced by an inferior judge. It was formerly competent in proceedings on Indictment in the Sheriff Court, but since the passing of the Criminal Appeal Act, 1926, it is no longer so. Suspension is, therefore, now confined to Summary Procedure. It is competent only against an existing warrant or conviction, and so where no sentence was signed it was held that there was nothing to suspend.⁵ So with a warrant, it is incompetent to bring a suspension until it has been executed.⁵ In conformity with these rules, suspension applies to final judgments or determinations only; the proper course to adopt in regard to earlier stages being advocacy.⁶ Once, however, the trial is over or a conviction has been obtained, a suspension opens up the whole prior proceedings. As a remedy it is confined to the accused. The High Court has an inherent power to entertain a suspension in cases amounting to fundamental nullity even although review be expressly excluded⁷ or another mode of review provided.⁸

¹ *Keith*, 1766, Hailes 135.

² 1746 Act, § 34.

³ *Ibid.* § 37.

⁴ *Ibid.* § 34.

⁵ *Jupp v. Dunbar*, 1863, 4 Irv. 355.

⁶ *Muir v. Hart*, 1912, S.C. (J.) 41;

6 Adam 601.

⁷ *Massey v. Lamb*, 1906, 8 F. (J.) 88; 5 Adam 59; *M'Kenzie v. M'Phee*, 1889, 16 R. (J.) 53; 2 White 188; *Craig v. Tarras*, 1897, 24 R. (J.) 88; 2 Adam 344.

⁸ *Schulze v. Steel*, 1890, 17 R. (J.) 47; 2 White 449.

It is competent to suspend search warrants.¹

This mode of appeal is appropriate to cases where the ground of appeal is something extrinsic to the complaint or the facts adduced. It is especially appropriate where the ground of appeal amounts to something in the nature of an attack on the judicial character of the proceedings. In such cases there may be a decided advantage in each side putting forward *ex parte* pleadings. Where, however, the point sought to be raised is one of law arising out of the complaint itself, or the facts found proved, a stated case is appropriate.

It is impossible to specify all the grounds on which suspension may be granted; but it may be said generally that a Bill of Suspension is competent—

- (a) Where the proceedings are fundamentally null in respect of some radical defect.² In cases of this type suspension would appear to be the most useful mode of seeking review.
- (b) Where the prosecution was oppressive.³
- (c) Where the proceedings have been in some respect grossly irregular.⁴
- (d) Where the complaint is irrelevant.⁵
- (e) Where the conviction is vitiated in a material part.⁶
- (f) Where the Court has either exceeded, or refused to exercise, its jurisdiction.⁷
- (g) Where the evidence led is clearly insufficient to prove the charge.⁸

No Bill of Suspension can be raised in regard to the merits of the case, or the facts found proved at the trial.⁹

If an accused person desires to bring before the High Court, on review, the question whether the facts proved entitled the Inferior Court to convict him of the offence charged, his proper course is to appeal by way of a stated case, in which the facts will be authoritatively set forth. The High Court has, however, in various cases, under a suspension proceeded on its own ascertainment of the facts, where the pleadings showed that the parties were not in dispute as

¹ *Bell v. Black*, 1865, 5 Irv. 57.

² *Collins v. Lang*, 1887, 15 R. (J.) 7; 1 White 482; *Morison v. Peters*, 1909, S.C. (J.) 58; 6 Adam 73.

³ *Mackenzie v. M'Phee*, 1889, 16 R. (J.) 53; 2 White 188; *Kelly v. Mitchell*, 1907, S.C. (J.) 52; 5 Adam 268.

⁴ *Craig*, 1848, J. Shaw 148; *Leavack v. Macleod*, 1913, S.C. (J.) 51; 7 Adam 87; *Aitken v. Wood*, 1921, J.C. 84.

⁵ *Walker v. Rodger*, 1885, 12 R. (J.) 32; 5 Coup. 595; *Adams v. M'Kenna*, 1906, 5 Adam 106; *Smith v. Semphill*, 1911, S.C. (J.) 30; 6 Adam 348.

⁶ *Clarkson*, 1871, 2 Coup. 125; *Connell v. Mitchell*, 1913, S.C. (J.) 13; 5 Adam 641.

⁷ *Muckersie v. M'Dougall*, 1874, 2 R. (J.) 12; 3 Coup. 54; *M'Pherson v. Boyd*, 1907, 5 Adam 247; *Caledonian Railway Co. v. Fleming*, 1869, 7 M. 554; 1 Coup. 193.

⁸ *Lockwood v. Walker*, 1910, S.C. (J.) 3; 6 Adam 124.

⁹ *Rattray v. White*, 1891, 19 R. (J.) 23; 3 White 89; *Brown v. Hilson*, 1924, J.C. 1; *Dunn v. Mitchell*, 1911, S.C. (J.) 46.

to the facts and what the undisputed facts were.¹ *M'Shane v. Paton* ² is an example of this practice.

There are also many objections which may be taken to a Bill of Suspension. Good objections are,—that the Act of Parliament contravened provides a special court to which the case might have been appealed; that the conviction complained of has never been formally completed; that the grounds of suspension involve inquiry into the merits. It is not a valid objection that the accused person has gone to prison, paid the fine, or otherwise obtempered the conviction.³ Nor, if the grounds are substantial, does it matter that the Act of Parliament contravened excludes review.⁴

There is authority to the effect that the lapse of a considerable interval between the time of pronouncing judgment and the presentation of the Bill is not of itself a bar to suspension on the ground that the real bar to suspension is acquiescence.⁵ But in more recent cases ⁶ acquiescence has been readily inferred from delay. This is specially so in cases where the ground of suspension is one which renders it desirable that the facts of the case should still be fresh in the minds of the Inferior Court, in view of the fact that the accused has the simple remedy of bringing a stated case.

If the question at issue is purely a legal one, and if the offence is a statutory one not involving a moral stigma, acquiescence may not so readily be inferred.⁷

2. Presenting Bill of Suspension and Service.—The procedure begins with the preparation of a Bill of Suspension or a Bill of Suspension and Liberation, if the accused is in prison. The Bill narrates the conviction, states the objections to it, and craves the remedy sought. Any officer of law may serve the Bill.⁸ Service is usually proved by a minute of acceptance written upon the Bill, and signed by the respondent or his agent.

3. Caution.—This is only ordered if the appellant is in prison and desires interim liberation.

4. Interim Liberation.—On the Bill being presented to a judge of the High Court, he may order the accused, if in prison, to be liberated

¹ *Brown v. Hilson*, *supra*, per Lord Cullen, at p. 6.

² 1922, J.C. 26; *cf.* *Lockwood v. Walker*, *supra*.

³ *Russell*, 1845, 2 Broun 572; *Bon-throne v. Renton*, 1886, 24 S.L.R. 75; 1 White 279.

⁴ *Simpson v. Board of Trade*, 1892, 19 R. (J.) 66; 3 White 167.

⁵ *Muirhead v. M'Intosh*, 1890, 2 White

473; *Adams v. M'Kenna*, 8 F. (J.) 79;

5 Adam 106; and see *Low v. Rankine*, 1917, J.C. 39, per Lord Justice-General.

⁶ *Montgomery v. Gray*, 1915, S.C. (J.) 94; 7 Adam 681; *Carson v. Macpherson*, 1917, J.C. 36; *Low v. Rankine*, *supra*; *M'Clure v. Douglas*, 1872, 2 Coup. 177.

⁷ *Adams v. M'Kenna*, *supra*; *Low v. Rankine*, per Lord Anderson.

⁸ 1908 Act, § 76.

on his finding caution to such amount as the judge may fix. The accused must in that case personally attend the hearing of the appeal.

5. Powers of High Court.—No special date is fixed for the hearing. The respondent is not bound to lodge written answers, or even to appear at the hearing, although he usually does both. The Bill is put out for hearing on a date fixed by the High Court. It is heard by a bench of at least three judges. If there is disagreement as to the facts connected with the alleged irregularities, the Court may remit to a competent person to take evidence and report.

The Court have power—

- (a) To pass the Bill and suspend the sentence *simpliciter*, and to order repayment of any fine, penalty, or expenses paid in terms of it ; or
- (b) To repel the reasons of suspension, refuse the Bill, and re-commit the suspender to prison if necessary ; or
- (c) To amend the conviction and sentence, and to remit to the Inferior judge, when necessary, with instructions.

The Court award expenses either in full or modified to a certain sum.¹

The power of the Court to set aside a conviction is subject to the restrictions and limitations prescribed by the 1908 Act, § 75.²

(4) *Appeal to Quarter Sessions of the Peace*

1. Competency.—This method of appeal is, as its name shows, competent only in the Justice of Peace Court. It is incompetent to appeal to Quarter Sessions in a case which has been tried before the Sheriff.³ Justices of the Peace in General or Quarter Sessions have power to review the proceedings of Special or Petty Sessions. The procedure is founded on the Scots Act, 1661, c. 38, and is permitted by a series of statutes. It has the advantage that it reopens the whole proceedings, and allows re-trial of the accused ; but it has the disadvantage that it is practically the same set of judges reviewing their own judgment.

It is permitted in regard to (a) prosecutions for common law crimes ; (b) prosecutions under statutes which prescribe this method of review ; and (c), possibly, prosecutions under statutes which prescribe no particular method.⁴ As an appeal from the Justice of Peace Court is competent on a stated case, appeal to Quarter

¹ P. 248, *infra*.

² P. 204, *supra*. See *Lockwood v. Walker*, 1910, S.C. (J.) 3 ; 6 Adam 124.

³ *Turnbull v. H.M. Adv.*, 1908, S.C. (J.) 47.

⁴ *Pirrie*, 1867, 5 Irv. 433.

Sessions need be employed only where it is wished to review the judgment on the evidence.

Either party aggrieved by a judgment of the Justices of Peace in Petty Sessions may, in a competent case, appeal to the next General Quarter Sessions of the Peace for the county within which the judgment was pronounced. The Quarter Sessions are held in the county town on the first Tuesdays of May, August, and March, and the last Tuesday of October.¹ In Revenue prosecutions, twenty clear days at least must intervene between the dates of the judgment and of the Quarter Sessions.² The appeal is taken within the time prescribed by the Act of Parliament under which the prosecution was instituted.

2. Form of Appeal.—The appellant lodges with the Clerk of the Peace a written appeal, of which a form is given in the Appendix ; but a minute of appeal written upon the principal complaint in open Court and authenticated by the Clerk has been held sufficient.³

3. Caution.—The conditions of the several Acts of Parliament under which prosecutions are instituted differ in regard to caution or consignation. The rule of the particular Act must be followed. In a common law charge, the Justices in Petty Sessions, at the time when the appeal is taken, fix the amount of caution which the appellant is to find. The bond of caution binds him to abide the appeal and pay the costs if ordered. -

4. Interim Liberation.—If the appellant is in prison in virtue of the conviction, the Justices cannot liberate him unless authorised by the special Act. In other cases, he must apply by Petition to the High Court of Justiciary, which can liberate him on caution, as in a suspension.⁴ The accused, if liberated, must personally attend the hearing of the appeal.

5. Service.—The appellant must, within the time prescribed by the special Act, intimate his appeal to the opposite party, and also to the Justices of whose proceedings he complains.⁵ This is done by serving the opposite party with a copy of the appeal, and by posting a written notice to each Justice of Peace in a registered envelope. Any officer of law may serve the appeal.⁶ Service may be proved by an acceptance of service written on the appeal, holograph of the respondent or his agent.

¹ 1661, c. 38.

² 4 & 5 Will. IV. c. 51, § 23.

³ *Robertson v. Duke of Atholl*, 1869,
1 Coup. 348.

⁴ *Pirrie*, 1867, 5 Irv. 433.

⁵ *Proctor v. Whyte*, 1854, 17 D.
197.

⁶ 1908 Act, § 76.

6. Citation of Witnesses.—If the witnesses are to be re-examined before Quarter Sessions, a special warrant to cite them is required. This is procured by a special Petition.

7. Powers of Court.—The appeal is heard before at least three Justices of the Peace, or whatever number constitutes a quorum according to the standing regulations of the county. They elect a chairman, who has only one vote. Objections to the appeal may be discussed. After these are repelled, the case is re-tried exactly as in Petty Sessions.¹ The Justices are not entitled to refuse to rehear the case.² The procedure is regulated by the 1908 Act. Proof may be led *de novo*.³ The Justices may adjourn the hearing to next Quarter Sessions.⁴ They give judgment afresh in the case, and may award expenses, but not against the Crown.⁵

On the merits, the judgment of Quarter Sessions is final; but in other respects it is subject to review in the same way as any other judgment of a Court of Summary Jurisdiction in Scotland. In Revenue cases there is a special method of appeal to the Court of Session acting as Court of Exchequer now to be described.

(5) *Appeal to the Court of Session as Court of Exchequer*

This method of appeal may be dismissed with a very brief explanation, as it is restricted to Customs and Excise prosecutions, and therefore has little general interest. It is competent in all cases where, at the passing of the Exchequer Court (Scotland) Act, 1856, a writ of *habeas*, or a writ of *certiorari*, might have competently issued from the Court of Exchequer to the effect of removing any proceedings before, or warrant granted by, an Inferior Court or magistrate to the Court of Exchequer in order to examination.⁶

Any party aggrieved in such a case may appeal to the Court of Session, sitting as the Court of Exchequer. The appellant lodges in the office of the Clerk attached to the Lord Ordinary in Exchequer causes a note of appeal.

The Clerk forthwith submits the note to the Lord Ordinary, who may either (*a*) at once direct the warrant or proceedings in the Inferior Court to be transmitted to the Court of Session; (*b*) refuse to give such direction or to entertain the appeal; (*c*) order service upon the Inferior judge, or the respondent, or both; (*d*) order these parties to lodge answers; or (*e*) order parties to be heard.⁷

¹ *Mackenzie v. Martin*, 1891, 18 R. (J.) 16; 2 White 589.

² *Murray v. Jones*, 1872, 2 Coup. 284; *Muckersie v. M'Dougall*, 1874, 2 R. (J.) 12; 3 Coup. 54.

³ *Alice v. Scott*, 1863, 1 M. 406; *Anderson*, 1868, 1 Coup. 18.

⁴ 1661, c. 38.

⁵ *The Queen v. Beattie*, 1866, 5 M. 191.

⁶ 19 & 20 Vict. c. 56, § 17.

⁷ *Ibid.*

After such preliminary steps as he shall think necessary, the Lord Ordinary hears counsel for the parties, and may quash or set aside the warrant or proceedings complained of, in whole or in part, giving such directions to the Inferior judge as may be just; or dismiss the appeal and remit back *simpliciter* the warrant or proceedings.¹

The power to set aside a conviction is subject to the limitations and restrictions prescribed by the 1908 Act, § 75.²

Expenses may be awarded, but not against the Crown, unless in a case of grave irregularity.³

The judgment of the Lord Ordinary may be reclaimed to the Inner House, and thereafter appealed to the House of Lords.⁴

(6) *Advocation*

Advocation is usually regarded as the converse of Suspension, in so far as it is the form of review adopted by the prosecutor, whereas Suspension is adopted by the accused person. It takes its name from its *advocating*, or calling, a case from an Inferior Court to a Superior. But advocacy is not limited to appeals by the prosecutor. The right to use this mode applies to either party.⁵ Its appropriate sphere is review of irregularities in the preliminary stages of a case.⁶ But recourse to advocacy is incompetent until the case is finally determined, unless in very special circumstances.

Illustration.—A person charged under an Indictment in the Sheriff Court, before the diet fixed for trial, brought an advocacy of an interlocutor repelling objections to the relevancy of the libel. It was held that the advocacy was incompetent.⁷ In any case, advocacy cannot be employed to obtain a review of the merits.⁸

The procedure begins with a Bill of Advocation, of which a form is given in the Appendix. It follows the general course described in a Suspension.⁹ As all the remedies competent under this process can be more conveniently obtained by means of a stated case, advocacy is used rarely.

As, however, appeal by stated case is inapplicable to procedure by Indictment, advocacy may still be adopted when it is desired to bring under the review of the High Court a judgment dismissing an Indictment on the ground of irrelevancy or incompetency, or on

¹ 19 & 20 Vict. c. 56, § 17.

² *Supra*, p. 204.

³ *The Queen v. Beattie*, 1866, 5 M. 191; *Sumner v. Middleton*, 1878, 5 R. 863; *Wilson v. McIntosh Brothers*, 1878, 5 R. 1097.

⁴ Exchequer Court Act, 1856, § 20; *Dodsworth v. Rijnbergen*, 1886, 14 R. 238.

⁵ Hume ii. 510; Macdonald 532.

⁶ *Kinnoul v. Tod*, 1859, 3 Irv. 501; *Smith v. Kinnoch*, 1848, Ark. 427.

⁷ *Muir v. Hart*, 1912, S.C. (J.) 41; 6 Adam 601.

⁸ *List v. Pirie*, 1867, 6 M. 185; 5 Irv. 559.

⁹ *Supra*, p. 219.

other grounds of a like nature. It is not expressly abolished by the Criminal Appeal Act, 1926. The undernoted cases may be referred to.¹

(7) *Appeal under Motor Car Act, 1903*

There is a special method of review, which may be here mentioned. The Motor Car Act, 1903,² § 18 (6), provides for an appeal in the following circumstances :—

- (a) If the accused has been convicted of an offence under the Act, and ordered to be imprisoned without the option of a fine ; or
- (b) If he has been convicted and adjudged to pay a fine exceeding £10 ; or
- (c) If his licence has been suspended, or if he has been declared disqualified for obtaining a licence.

The appeal is taken from the Sheriff-Substitute to the Sheriff-Depute, and is heard summarily. It may be taken immediately after the judgment has been pronounced, or within seven days thereafter. The taking of the appeal suspends the sentence (if any) until the appeal has been disposed of. The appellant at the time of taking the appeal must lodge in the hands of the Clerk of Court a bond with a sufficient cautioner, or otherwise give security satisfactory to the Court for his appearing before the Sheriff-Depute.

The Sheriff-Depute may hear evidence, whether led at the original hearing or not, and may reconsider the merits of the case. He has power to reverse or confirm, in whole or in part, the judgment appealed against, or to give such new or different judgment as he, in his discretion, may think fit. His judgment is final, and not subject to review except by appeal on a stated case to the High Court of Justiciary. In Scotland there is no right of appeal under § 11 of the Act.³

Illustration.—The Motor Car Act, 1903, § 11, provides that any person adjudged to pay a fine exceeding 20s. may appeal ; and § 18, which applies the Act to Scotland, provides that any person adjudged to pay a fine exceeding £10 shall have a right of appeal, and that such appeal shall be to the Sheriff-Depute. It was held that § 11 did not apply to Scotland, the only right of appeal in Scotland being under § 18.⁴

Though there is no reported case in Scotland of an appeal

¹ *Craig v. Galt*, 1881, 4 Coup. 541 ;
M' Rae v. Cooper, 1882, 4 Coup. 561 ;
Duncan v. Cooper, 1886, 13 R. (J.) 36 ;
 1 White 43 ; *Dunbar v. Johnston*, 1904,
 7 F. (J.) 40 ; 4 Adam 505.

² 3 Edw. VII. c. 36.

³ *Bell v. Mitchell*, 1905, 8 F. (J.) 15 ;
 4 Adam 661.

⁴ *Bell v. Mitchell*, *supra*.

against a conviction under the Motor Car Act, 1903, appeals are not uncommon in practice. The procedure is, as a rule, as follows :—

(1) The respondent's agent writes a minute on the principal complaint appealing to the Sheriff against the conviction.

(2) At the time of taking the appeal a bond of caution is lodged.

(3) The Sheriff subjoins to the minute of appeal a minute appointing a date for hearing the appeal and granting warrant to cite witnesses and havers for both parties, and a copy of this minute is served on the respondent by a police officer.

(4) At the hearing of the appeal the complaint is read over and a plea of not guilty minuted. Thereafter, evidence is led for both parties, including, it may be, evidence additional to that led at the first trial.

PART III

MISCELLANEOUS TOPICS AFFECTING
BOTH SOLEMN AND SUMMARY
PROCEDURE

CHAPTER I

PUNISHMENT, PENALTIES, AND EXPENSES

It is proposed to collect in this chapter the rules relating to the principal methods of dealing with convicted persons, whether they have been convicted upon Indictment or upon Summary Complaint.

The rules for the treatment of persons under sixteen years of age are explained in a subsequent chapter, and the principles laid down in this chapter are not meant to apply to such persons, except where the fact is expressly stated.

At the end of the chapter there is a summary of the powers conferred by statute, enabling every Court to mitigate the penalties to which an accused person is liable, in respect of the contravention of any Act of Parliament, or regulation having statutory authority which enacts a punishment for its breach. As regards common law crimes, such provision is not required, every judge having full discretion in the matter of punishment, so far as his jurisdiction in that matter extends. But statutory contraventions are in a different position. The Act creating the offence prescribes the punishment and, apart from express power conferred by the Legislature, the prescribed punishment would have to be imposed in every case.

1. Capital Punishment.—Sentence of death, which is the extreme penalty of the law, can be imposed in Scotland only by a judge of the High Court of Justiciary, and only upon a person convicted of treason, murder, or an attempt to murder under the Criminal Law (Scotland) Act, 1829.¹

Where death is the appropriate penalty, the judge has no option but to pronounce that sentence. The power to mitigate can be exercised by the Sovereign alone. The death sentence involves escheat to the Crown of the condemned person's moveable estate.

When the death sentence is to be pronounced, the presiding judge assumes the black cap. After the verdict of the jury finding the panel guilty has been recorded, the judge signs the sentence of death on a paper separate from the record, and immediately thereafter pronounces sentence. The sentence is then entered in the record and signed by the judge.²

If a woman puts forward the plea of pregnancy in bar of execution, the diet is adjourned, and sentence delayed until the birth of the

¹ 10 Geo. IV. c. 38.

² Act of Adjournal, 1st June 1909.

child. On such a plea being lodged, the Court remits to skilled professional persons to inquire and report on oath as to the woman's condition. If they are unable to report at once, the diet may be adjourned.

The time of execution must be fixed in the sentence. The date cannot be less than fifteen or more than twenty-one days after the date of sentence, if south of the Forth; or less than twenty or more than twenty-seven days if north of the Forth.¹ The sentence is a warrant to the governor of the prison in which the condemned prisoner is confined, authorising him to deliver the prisoner for execution.

The sentence is carried out within the walls of the prison in which the offender is confined at the time of execution. Only officials and relatives are allowed to be present. The body is buried within the prison walls, or, if there is no space, in such other fit place as the Secretary for Scotland may appoint.² The execution is carried out by the magistrates of the burgh in which the prison is situated, or, if the prison is outside a burgh, by the Sheriff of the county. Sentence of death is not to be passed where evidence of the crime charged is contained solely in depositions read at the trial.³

Sentence of death cannot be pronounced on, or recorded against, a child or young person under sixteen years of age.⁴

Special provision is made by the Criminal Appeal Act, 1926, to postpone the date of sentence till after the expiry of the time for appealing, and in the event of an appeal being taken and refused, the Court shall fix a day for execution, which day shall be not less than fourteen or more than eighteen clear days after the dismissal of the appeal.⁵

2. Penal Servitude.—Penal servitude ranks next to capital punishment in point of severity. It was substituted for transportation, after 1st July 1857, by the Penal Servitude Act, 1857.⁶ It is regulated by a series of statutes, of which the principal are the Penal Servitude Acts of 1853, 1857, 1864, and 1891. The provisions of the Transportation Act, 1824,⁷ and other provisions applicable to persons under sentence of transportation, are extended to persons under sentence of penal servitude. The High Court of Justiciary is the only Scottish Court which can award this punishment.

Any person who, prior to 1st September 1853, might have been sentenced to a term of transportation, is liable to be sentenced to

¹ 11 Geo. IV. and 1 Will. IV. c. 37.

² 31 & 32 Vict. c. 24.

³ 5 & 6 Geo. V. c. 94, § 3.

⁴ Children Act, 1908 (8 Edw. VII. c. 67), § 103. See *infra*, p. 255.

⁵ 16 & 17 Geo. V. c. 15, § 4.

⁶ 20 & 21 Vict. c. 3, § 2.

⁷ 5 Geo. IV. c. 84.

be kept in penal servitude for a term of the same duration ; and where the Court might award one of any two or more terms of transportation, it has the like discretion as regards terms of penal servitude.¹

Where the Court has under any enactment power to award a sentence of penal servitude, the sentence may be for any period not less than three years and not exceeding five years, or any greater period authorised by the enactment ; and where it is empowered or required to award a sentence of penal servitude, it may substitute imprisonment for any term not exceeding two years, with or without hard labour.² The term of penal servitude for common law crimes varies from three years to life.

It is not uncommon for a capital sentence to be commuted into one of penal servitude. Where this is done, the commutation has the same effect, and is signified and carried out in the same manner, as where the death sentence was commuted upon condition of transportation beyond seas.³

There are elaborate provisions for the liberation of convicts upon licence, and for forfeiture or revocation of the licence if the convict abuses the privilege. It is unnecessary to explain these here. Remission of sentence is earned by industry accompanied by good conduct. The maximum is one-fourth of the sentence in the case of a male, and one-third in the case of a female. The rules in regard to life sentences are special.

The Crown Agent issues to Procurators-Fiscal quarterly lists of convicts released on licence. It is necessary to keep these lists in mind when instituting criminal proceedings against an old offender, because, if he is a licence-holder, the Court may have to deal with his licence. It is also necessary to keep in mind the returns which have to be made to the Crown Office when an ex-convict is again convicted of crime.

A person under sixteen years of age cannot be sentenced to penal servitude.⁴

Borstal Institutions.—By the Prevention of Crime Act, 1908, Part I., as amended by the Criminal Justice Administration Act, 1914, § 11, provision is made for young offenders between the ages of sixteen and twenty-one, convicted on Indictment of an offence punishable by penal servitude or imprisonment, being sent, where such a course seems to the Court expedient, to a “ Borstal institution ” for a term of not less than two years nor more than three years. The Act makes provision for the establishment of Borstal institutions—that is to say, places in which young offenders, whilst detained,

¹ Penal Servitude Act, 1857, § 2.

³ Penal Servitude Act, 1853 (16 & 17 Vict. c. 99), § 5.

² Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), § 1.

⁴ Children Act, 1908 (8 Edw. VII. c. 67), § 102 (1) and (2).

may be given such industrial training and other instruction, and be subjected to such disciplinary and moral influences as will conduce to their reformation and the prevention of crime.

3. Imprisonment.—Imprisonment, with or without hard labour, is the punishment next to penal servitude in point of severity. It calls for no comment. In modern practice it never exceeds two years, and seldom eighteen months.

Solitary confinement is authorised by a few Acts of Parliament, but it is limited to one month at a time, and not more than three months in each year. It is never ordered unless specially required by statute.

A person under fourteen years of age cannot be sentenced to imprisonment under any circumstances; and a person over fourteen but under sixteen, only in the special contingencies specified in Part III., Chapter II.¹ As explained in the preceding section, young offenders between the ages of sixteen and twenty-one may be sent to a Borstal institution instead of being imprisoned. This course originally applied to procedure on Indictment, but the 1914 Act has made it competent in Summary Procedure also.²

Provisions as to Imprisonment under the 1914 Act.—Where a Court of Summary Jurisdiction has power to sentence to imprisonment, the Court may, in lieu thereof, order that the offender be detained within the precincts of the Court, or at any police station, till such hour, not later than eight in the evening on the day on which he is convicted. In making such an order the Court shall take into consideration the distance between the place of detention and the offender's abode, and shall not make such an order as will deprive the offender of a reasonable opportunity of returning to his abode on the day on which such order of detention is made.³

The same Act provides that no person shall be sentenced to imprisonment by a Court of Summary Jurisdiction for a period of less than five days,⁴ and provision is made for the substitution of police custody for such imprisonment.⁵

4. Whipping.—The whipping or flogging of adults is almost unknown in Scottish practice. The provisions of the Whipping Act, 1862,⁶ to the effect that no offender in Scotland above sixteen years of age shall be whipped for theft, or for crime committed against person or property, leave little room for the use of this form of punishment.

¹ Children Act, 1908, § 102 (3).

² 1914 Act, § 10.

³ *Ibid.* § 12.

⁴ *Ibid.* § 13 (1); "sentenced to imprisonment" is defined in § 41.

⁵ *Ibid.* § 13.

⁶ 25 & 26 Vict. c. 18.

In the special case of a person convicted of discharging firearms at, or throwing or using any offensive matter or weapon with intent to injure or alarm, the Sovereign, the accused, in addition to penal servitude or imprisonment, may be ordered to be publicly or privately whipped.¹

The punishment is nowadays practically restricted to the private whipping of youthful offenders.² As regards these, the statutory conditions are as follows³ :—

- (1) The offender must be a male.
- (2) His age, in the opinion of the judge, must not exceed fourteen years.
- (3) He must be convicted in a case where it is competent to award imprisonment, or fine with the alternative of imprisonment.
- (4) The sentence must be carried out according to regulations made by the Lord Advocate and approved by the Secretary for Scotland.
- (5) The sentence must specify the number of strokes to be inflicted, and these must not exceed twelve.
- (6) The sentence must also specify the instrument to be used in inflicting the strokes ; and
- (7) The boy must not be whipped more than once for the same offence.⁴

Juvenile offenders sentenced in a Burgh Police Court need not be taken to prison to undergo the sentence.⁵

In virtue of the fourth section of the Criminal Law Amendment Act, 1885,⁶ as amended by the Criminal Law Amendment Act, 1912,⁷ it is competent in respect of immoral offences to whip boys between the ages of fourteen and sixteen. In such cases, the number of stripes and the instrument are those prescribed by the regulations in force for the time being.

It was formerly doubted whether a boy, between the ages of fourteen and sixteen, could be whipped for an offence at common law. The circumstances in the case of *Stevenson v. Lang*⁸ were very peculiar, and did not throw much light on the point. It has, however, now been definitely decided that it is competent to pronounce a sentence of whipping upon such a boy.⁹ The Children Act, 1908, § 107, mentions whipping as one way of dealing with a child or young person.

¹ 5 & 6 Vict. c. 61, § 2, as amended by 4 & 5 Geo. V. c. 58, §§ 36, 44, sched. 4.

² P. 254, *infra*.

³ 55 & 56 Vict. c. 55, § 514.

⁴ 23 & 24 Vict. c. 105, § 74 ; 25 Vict. c. 18, §§ 1 and 2.

⁵ *H.M. Adv. Petitioner*, 1896, 2 Adam 159.

⁶ 48 & 49 Vict. c. 69.

⁷ 2 & 3 Geo. V. c. 20.

⁸ 1878, 4 Coup. 76.

⁹ *Mackay v. Lamb*, 1923, J.C. 16.

5. Fines, Forfeiture, and Caution for Good Behaviour.—The most ordinary punishments in the case of minor common law crimes are a fine, with the alternative of imprisonment in default of payment, or an order to find caution for good behaviour, with a like alternative. In statutory contraventions a fine or pecuniary penalty is frequently imposed, with alternative imprisonment.

Where an accused person is found liable in any penalty, the Court may, whether the statute or order imposing such penalty does or does not provide any method for the recovery thereof, adjudge the accused to be imprisoned in the event of failure to pay such penalty, either immediately, or within such period as the Court may fix; but such imprisonment must not exceed the respective periods after-mentioned.¹

The periods of imprisonment for non-payment of any sum imposed by the Court as a penalty, or for failure to find caution, are regulated thus—

When the amount adjudged to be paid, or for which caution is to be found, does not exceed.		The period of imprisonment must not exceed—
5s.	.	5 days.
Exceeds—		
5s. but does not exceed	£1	10 days.
£1	£3	20 "
£3	£5	30 "
£5	£20	60 "
£20	.	3 months.

Where the Court, in imposing any pecuniary penalty or sum for which caution is to be found, does not specify the period of imprisonment in default of payment of such penalty, or on failure to find caution, such period is to be the maximum period applicable to the non-payment of the amount imposed.² Unless expressly authorised by statute, it is incompetent to impose imprisonment with hard labour in default of payment of a fine.³

If in any sentence, or extract sentence, the period of imprisonment inserted in default of payment of a penalty or of caution being found is in excess of that competent under the above scale, such period of imprisonment is held as being reduced to the maximum period under the scale applicable to such default. The judge who pronounced sentence has power to order such sentence and extract to be corrected accordingly.⁴

¹ 1908 Act, §§ 47 and 77 (4).

³ *Anderson v. Begg*, 1907, S.C. (J.) 102; 5 Adam 387.

² *Ibid.* § 48.

⁴ 1908 Act, §§ 48 and 77 (4).

The above periods of imprisonment apply to the non-payment of any sum imposed, notwithstanding that the statute or order imposing the penalty fixes any other or different period of imprisonment.¹

These provisions are without prejudice to the operation of the Fine or Imprisonment (Scotland and Ireland) Act, 1899, after-mentioned.²

Forfeiture of Instruments—Where an accused person is convicted of an offence, or is dealt with under the Probation of Offenders Act, 1907, the Court has power to order the forfeiture of any instruments or other articles found in his possession, used or calculated to be of use in the commission of the offence, and also to order said instruments or other articles to be destroyed or otherwise disposed of.³ Under this provision it is competent to forfeit housebreakers' tools, poachers' nets, and all similar articles. A serious defect in the Night Poaching Acts and some other statutes is thus remedied. The provision applies even when the statute contravened is silent on the subject. It also applies to common law offences.

In proceedings under the Revenue Acts it is lawful to grant decree for condemnation of goods seized as forfeited under the provisions of these Acts.⁴

Enforcement of Payment under 1914 Act.—Where a person has been sentenced to pay a penalty by a conviction by a Court of Summary Jurisdiction, the Court may order him to be searched, and any money found on him on apprehension, or when so searched, or which may be found on him when taken to prison in default of payment, may be ordered to be applied in payment of the penalty. The money shall not, however, be so applied, if the Court is satisfied that the money does not belong to the person on whom it is found, or that the loss of the money will be more injurious to his family than his imprisonment.⁵ The procedure to be followed is regulated by Act of Adjournal dated 18th March 1915.⁶

Considerations affecting the Imposition of Sentences of Fine or Imprisonment.—It is a matter of frequent comment that the fine and alternative imprisonment for the same offence differ greatly in different jurisdictions. This is to some extent unavoidable, looking to the varying circumstances under which crimes are committed, and the varying temperaments of judges. Nevertheless it seems possible to attain greater uniformity, and with

¹ 1908 Act, §§ 48 and 77 (4).

² *Ibid.* p. 236, *infra*.

³ *Ibid.* §§ 44 and 77 (4).

⁴ *Ibid.* § 4.

⁵ 1914 Act, § 4, § 42.

⁶ See Appendix III.

this object a few points bearing on the subject will here be considered.

Where a person is convicted of a statutory offence involving in the first instance the imposition of a pecuniary penalty only, imprisonment may properly be regarded merely as a means of enforcing payment of any penalty imposed; but the position is different in the case of a common law offence. There the fine and the alternative imprisonment are *separate punishments* for the crime of which the accused has been convicted. It is a mistake to suppose that the imprisonment is merely a compulsitor to compel payment of the pecuniary penalty. No doubt, it often acts as such, but in the eye of the law that is not its primary purpose. The accused person is offered his choice. He may pay the penalty out of his pocket, or in his person. If he goes to prison, he does so in order that he may suffer the punishment due to his offence, and not because he has failed to pay the fine. From this consideration it follows that, in fixing the amount of pecuniary penalty and the alternative imprisonment, a judge should carefully weigh the proportion of each which in his opinion is adequate punishment for the offence of which the accused person has been convicted.

The provisions of the Fine or Imprisonment (Scotland and Ireland) Act, 1899,¹ have also to be kept in view. An accused person, convicted of crime, does not necessarily have to undergo the full term of alternative imprisonment. By paying part of the fine, he may escape a proportional part of the imprisonment. The statute provides that any person committed to prison for non-payment of a sum adjudged to be paid by the conviction of any Court of Summary Jurisdiction, on payment to the governor of the prison, under conditions prescribed by the rules, of any sum in part satisfaction of the sum adjudged to be paid, and of any charges for which the prisoner is liable, may have the term of imprisonment reduced by a number of days bearing as nearly as possible the same proportion to the total number of days for which he was sentenced, as the sum so paid bears to the sum for which he was liable. This provision is extended to the police cells declared to be a legal prison in terms of the Prisons (Scotland) Acts, 1860 to 1887, the money being paid to the officer in charge. It will be observed, however, that the Act applies only to fines imposed in Summary Jurisdiction.

The effect of this Act is twofold. The Court need not be deterred from imposing a substantial fine by the idea that the accused may not be able to pay the full amount; and, on the other hand, the Court ought always to make the imprisonment bear such a relation to the amount of the fine that the latter can be divided by the number of days without leaving a remainder. Fractions in the dividend cause much trouble.

¹ 62 & 63 Vict. c. 11.

Another question of discretion, depending upon the circumstances of the accused, is the number of days of imprisonment which should be imposed as the alternative of non-payment of the fine. Without attempting to lay down any rule on the subject, it may be suggested as a convenient principle that the maximum period fixed by the scale should be adopted. If this is done, the judge has only to fix the fine, and the period of imprisonment will, in terms of the statute, work out automatically.

It is, of course, necessary in every case to consider the social position of the prisoner when imposing a sentence of fine or imprisonment. This is a matter which demands the exercise of sound discretion.

The amount of the fine which should be imposed in any given case must necessarily vary largely according to the circumstances of the person on whom it is imposed. It is the duty of the Court to take into consideration, among other things, the means of the offender so far as they appear or are known to the Court.¹ Thus, a fine of 20s. in the case of a labourer probably represents the earnings of a week, and, if it has to be met out of these earnings, means that for a week those who may be dependent on him have to be supported by others. In such circumstances one of two courses would seem expedient—either (*a*) to impose a smaller fine which could at once be met, or (*b*), if the case is one calling for the imposition of a larger fine, to allow time for payment.

It will as a general rule be found best to impose sums of even amount, such as 5s., 10s., 20s., 25s., etc., leaving the periods of imprisonment to work out automatically under the scale, the maximum period fixed by the scale being then applicable. It is very desirable, in view of the provisions of the Fine or Imprisonment (Scotland and Ireland) Act, 1899, that the period of imprisonment imposed in relation to the fine should permit of the fine representing an even sum per day, and it will be observed that this is so in the case of each of the sums above mentioned on the maximum ratio: thus, a fine of 5s. represents on that scale 1s. per day; 10s., 1s. per day; £1, 2s. per day; 25s., 1s. 3d. per day. The suggestion made is that the fines should vary according to the means and position of the offender. Thus, while 5s. might be a sufficient fine for a day labourer, 20s. might be imposed for the same offence committed by a tradesman earning larger wages.

It need hardly be said that great care should be taken that any sentence imposed is within the limits of the Act, and it might be useful if in every Court there was hung up in a glass frame a card with the scale of imprisonment printed on it. This would enable the Clerk of Court to verify at once the competency of any sentence imposed. It is no longer, however, fatal to a sentence if the period

¹ 1914 Act, § 42 (6).

of imprisonment imposed in default of payment of a penalty exceeds that fixed by the Act. The imprisonment is held as being reduced to the maximum period applicable to the non-payment of the amount imposed.

The Act provides that the period of imprisonment in default of payment of a penalty is to apply even where the statute imposing the penalty fixes a different period. If, however, the maximum period of imprisonment competent under the scale is in excess of that prescribed by the special statute, it is suggested that the period of imprisonment imposed should be limited to that prescribed by the special statute. This is the view most favourable for the accused, and is not inconsistent with the provisions of the Act, as it will be observed that under the scale the period of imprisonment in default of payment is not to *exceed* the limits fixed by the Act. On the other hand, when by the special statute the period of imprisonment competent in default of payment of a penalty is in excess of that fixed by the scale, it will be necessary to limit the period to that competent under the Act.

Time for Payment.¹—The Court must allow time for the payment of a fine unless it is satisfied that the accused is possessed of sufficient means to pay it at once, or unless the accused on being asked if he desires time does not express any such desire, or fails to satisfy the Court that he has a fixed abode within the jurisdiction. The Court may, however, for a special reason, refuse an allowance of time. What constitutes a special reason is not defined in the Act and has not yet been the subject of consideration in the High Court. The reasons for disallowing time must be given in the sentence. Where a person desires time to pay, the Court must give consideration to any representation made by him. The time allowed must not be less than seven days. The accused may come forward within the time allowed and elect to take imprisonment instead of paying the fine. Where time has been allowed, the accused may make an application for an extension of time, but such application must be made within the time originally allowed for payment, and the Court must be satisfied that the accused has been and will be unable to pay within the time allowed through unforeseen circumstances, and has a reasonable prospect of being able to pay if further time is allowed.²

In the case of persons not less than sixteen and not more than twenty-one, the Court may order the accused to be put under supervision until the sum is paid.³

¹ 1914 Act, § 42 (2).

³ Act of Adjournal, 18th March

² 1914 Act, § 42 (3), and Act of 1915.
Adjournal, 18th March 1915.

Caution.—With regard to the finding, forfeiture, and recovery of caution, the following provisions apply :—

- (1) Caution may be found by consignment of the amount thereof with the Clerk of Court, or by bond of caution. Such bond may be signed by the mark of the cautioner.
- (2) Where caution becomes liable to forfeiture, such forfeiture may be granted by the Court on the motion of the prosecutor, and, where necessary, warrant granted for the recovery thereof.
- (3) The Court may order any cautioner to be imprisoned in the event of his failing to pay the amount due under his bond within six days after he has received a charge to that effect, and until payment is made, such imprisonment being for a fixed period and regulated by § 48 of the Act. The Court, if it adjudges it expedient, may, on the application of the cautioner, grant time for payment, or may, instead of ordering imprisonment, order recovery of such caution by civil diligence as provided for in § 49 of the Act.
- (4) Bail may be found and forfeited, and the like procedure be competent in default of payment thereof as is hereinbefore provided in regard to caution. Any bail found is held to continue in force until the case is finally disposed of, or until the expiry of six months from the date when such bail is found, notwithstanding that the diets may have been from time to time continued or deserted *pro loco et tempore*, or not called. The cautioner is entitled to withdraw his bond of caution at any diet of the Court at which the accused appears personally.
- (5) Where, instead of being liberated on bail, the accused is liberated under a penalty, in the event of his failure to attend at any future diet, and such penalty is declared to be forfeited, the amount thereof may be added to any other penalty subsequently imposed on him, or the Court may pronounce a separate finding in respect of such penalty and may grant warrant for the imprisonment of the accused in the event of non-payment thereof.¹

Recovery by Civil Diligence.—In Summary Jurisdiction a pecuniary penalty may be ordered to be recovered by civil diligence.² Such order may be made in any case (1) where the penalty has to be recovered in that manner in terms of the Act, as, where proceedings have been taken against a company, association, incorporation, or body of trustees, in their corporate capacity ; or (2) where

¹ 1908 Act, § 50.

² *Ibid.* § 49. See *Kinnear v. Brander*, 1914, S.C. (J.) 141 ; 7 Adam 456.

the Court thinks it expedient to order a penalty to be so recovered. In such cases there are added to the finding of the Court imposing such penalty the words "and decerns and ordains instant execution by arrestment and also execution to pass hereon by poinding and sale, after a charge of ten free days." Such diligence, whatever the amount of the penalty imposed, may be executed in the same manner as if the proceedings were on an extract decree of the Sheriff's Small Debt Court. Where proceedings by civil diligence under this section are adopted, imprisonment is not thereafter competent.¹

Recovery by civil diligence is, as a rule, confined to cases to which imprisonment is inapplicable, *e.g.*, offences by a company. While this section makes provision for the Court, if it thinks it expedient, ordering recovery by civil diligence, it is thought that such an order would only be applicable to cases where, prior to the passing of the Act, civil diligence was competent, and not to a case where imprisonment formed the only means of recovery. There might, perhaps, be an exception to this in a case where, owing to special circumstances, imprisonment was impracticable—as, for example, where a person is medically certified as unfit to undergo imprisonment.

Lord M'Laren laid down a distinct principle for the guidance of judges in the Inferior Courts, in the case of *Moffat v. Shaw*,² where a question arose as to the use of civil diligence in place of imprisonment. His Lordship, speaking of the Vaccination Act, 1863, said: "In the enforcement of the penalty the statute requires that the more humane and more effective alternative of imprisonment for a short period should be adopted in preference to the civil remedy of poinding, which might be ruinous to a poor man." These words should be remembered when a proposal is made for the recovery of a penalty by civil diligence, in any case where it is possible to use the "more humane and more effective alternative of imprisonment."

Person to whom Penalties are to be paid.—All penalties and expenses imposed under the Act are to be paid to the Clerk of Court, to be accounted for by him to the person entitled thereto. It is not necessary to specify in any sentence the person entitled to payment of any such penalty or expenses, unless where it is necessary to provide for the division of the penalty.³

This obviates the questions which sometimes formerly arose as to the person to whom payment of a penalty should be directed to be made. The Act does not impose on the Clerk of Court any obligation to take steps with a view to the recovery of penalties. This rests with the prosecutor. In prosecutions for the Crown in

¹ 1908 Act, § 49. See *Kinnear v. Brander*, 1914, S.C. (J.) 141; 7 Adam 456.

² 1896, 23 R. (J.) 18; 2 Adam 57.

³ 1908 Act, § 51.

the Sheriff Court, it is usual for the Procurator-Fiscal to collect the fines and penalties imposed and, by arrangement with the Exchequer, apply them towards his outlays.

The provision in regard to division of the penalty applies to prosecutions such as those under the Diseases of Animals Act, 1894, where the Court may order part of the penalty to be paid to the complainer, the balance then going to the Exchequer.

6. Probation.—The Probation of Offenders Act, 1907, as amended by the Criminal Justice Administration Act, 1914, permits in certain cases the release of offenders on probation without immediate punishment. These powers may be exercised in the following circumstances :—

In Summary Jurisdiction—

- (a) The offender must be charged before a Court of Summary Jurisdiction with an offence punishable by such Court.
- (b) The Court must think that the charge is proved.
- (c) The Court must be of opinion—having regard (a) to the character, antecedents, age, health, or mental condition of the person charged ; or (b) to the trivial nature of the offence ; or (c) to the extenuating circumstances under which the offence was committed—that it is inexpedient to inflict any punishment, or any other than a nominal punishment, or that it is expedient to release the offender on probation.¹

The Court may in these circumstances, without proceeding to conviction, make an order either—

- (a) Dismissing the charge ; or
- (b) Discharging the offender conditionally on his entering into a bond, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.²

In Solemn Jurisdiction.—Where any person has been convicted on Indictment of any offence punishable with imprisonment, and the Court is of the opinion set forth in division (c) of the preceding paragraph, the Court may, in lieu of imposing a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a bond, with or without sureties, to be of good behaviour

¹ 7 Edw. VII. c. 17, § 1 (1).

² *Ibid.*

and to appear for sentence when called on, at any time during such period, not exceeding three years, as may be specified in the order.¹

Compensation and Costs.—When the Court pronounces such an order, either in Solemn or Summary Jurisdiction, it may in addition order the offender to pay such damages for injury, or compensation for loss, and to pay such costs of the proceedings as the Court thinks reasonable.² In default of payment of such damages, compensation, or costs, imprisonment may be awarded.³ In a Court of Summary Jurisdiction, the amount of damages or compensation must not exceed £10, unless a higher limit is fixed by any enactment relating to the offence.⁴ If the offender is under sixteen, and it appears to the Court that his parent or guardian has conduced to the commission of the offence, the Court may order payment of damages and costs by such parent or guardian.⁵

An order under this statute, made by a Court of Summary Jurisdiction, has the like effect as a conviction, for the purpose of revesting or restoring stolen property, and of enabling the Court to make orders as to the restitution or delivery of property to the owner, and as to the payment of money upon, or in connexion with, such restitution or delivery.⁶

Bond.—A bond ordered to be entered into under the Act shall, if the Court so order, contain a condition that the offender shall be under the supervision of such person as may be named in the order, during the period and under such other conditions for securing such supervision as may be specified in the order. This is called a Probation Order.⁷

A bond under the Act may contain such additional conditions with respect to residence, abstention from intoxicating liquor, and any other such matters as the Court may, having regard to the particular circumstances of the case, consider necessary for preventing a repetition of the same offence or the commission of other offences.⁸

The Court must furnish the offender with a notice in writing, stating in simple terms the conditions he is required to observe.⁹ Forms relating to these matters will be found in the Appendix.

Probation Officers.—The Sheriff may appoint suitable persons to act as probation officers for the district of a county outwith the police boundaries of any royal, parliamentary, or police burgh.

¹ 7 Edw. VII. c. 17, § 1 (2).

² *Ibid.* § 1 (3).

³ 1908 Act, § 2, "Penalty," and § 47.

⁴ *Ibid.*

⁵ P. 256, *infra*.

⁶ 1908 Act, § 1 (4).

⁷ *Ibid.* § 2.

⁸ § 2 (2) as amended by 1914 Act, § 8.

⁹ *Ibid.* § 2.

The burgh magistrates make the appointment for the district of a burgh. A probation officer, when acting under a probation order, is subject to the control of the Sheriff Court, or Burgh Police Court, as the case may be.¹ The statute contains provisions for the appointment and remuneration of these officers, which need not be quoted here. The 1914 Act gives the Secretary of State power to recognise societies for the care of youthful offenders, and allows the Court to appoint probation officers from them.

The person named in a probation order is selected—

- (a) In Summary Jurisdiction, from amongst the probation officers for the district of the county or burgh *in or for which the Court acts* ; or
- (b) In Solemn Jurisdiction, from amongst the probation officers for the district of the county or burgh *from which the person charged was committed for trial*.²

If the Court considers it expedient, on account of the place of residence of the offender, or for any other special reason, it may name in the order a probation officer for some other district, either county or burgh ; or, if it considers that the special circumstances of the case render it desirable, it may name a person who has not been appointed to be a probation officer.

The Court has power to order the forfeiture of any instruments or other articles found in the possession of the accused, used or calculated to be used in the commission of the offence charged, and also to order such instruments or articles to be destroyed or otherwise disposed of.³

Breach of Bond.—The provisions of the statute for dealing with a person on probation who fails to implement any of the obligations of his bond, are not very happily expressed. They are specially adapted to English procedure, and take no notice of the forms of process used in Scottish Courts.

If the offender fails to observe any of the conditions of his bond, the first step prescribed by the Act is the appearance of the probation officer, or some other witness, before the Court which has under the bond jurisdiction to pronounce sentence, or any Court of Summary Jurisdiction. If that Court is satisfied by *Information on Oath* (a process foreign to Scottish practice) of the failure of the offender, it may either issue a warrant for his apprehension, or a summons to him and his sureties (if any), requiring them to attend at a specified diet.⁴ In the Appendix we have furnished a form of process, equivalent to the English *Information on Oath*.

Upon this warrant being issued, the offender may be brought

¹ 1908 Act, § 8.

³ *Ibid.* §§ 44 and 77 (4).

² *Ibid.* §§ 3 and 8.

⁴ § 6 (1).

before the Court by apprehension or may appear on citation. The Court may remand him, if necessary, so that he can be brought before the Court before which he is bound by his bond to appear for sentence. This latter contingency will arise where he has had to be taken in the first instance before some other Court.¹ But it is unnecessary that the magistrate who deals with an offender in breach of his bond should be the one who originally dealt with him,² and on being satisfied that the offender has failed to observe any condition of his bond, the Court may forthwith, without further proof of his guilt, *convict* and *sentence* him for the original offence.³ It will be observed that where the procedure is on Indictment it is only necessary to *sentence* the accused, as he will have been already *convicted*. It will be noted that the Court does not require to be satisfied by evidence on oath, and a written report signed by the probation officer should in the ordinary case be sufficient.

Variation of Conditions of Probation.—The Court has power to vary, alter, and add to the conditions of the order on the application of the probation officer. The Court may extend the duration of the order, but not, however, so as to make its total duration more than three years. It may also diminish the period of probation or terminate it altogether.⁴

7. Admonition.—In petty charges, such as can be adequately met by arbitrary punishment, it is competent for the Court to dismiss the prisoner without punishment, after admonishing him in regard to his conduct. This power is conferred in every case, whether the offence be a common law or a statutory one. It should, as a general rule, be exercised in common law charges only where the accused is unable to pay a small fine, where he is of a law-abiding character, and where there is no necessity for placing him under probation.

A Court may in its discretion, if such course appears to meet the justice of the case, dismiss with an admonition any person found guilty of any act, or attempt, or omission punishable by law.⁵ It is thus competent to dismiss with an admonition a person charged with a *statutory contravention*, and the difficulty raised by decisions to the contrary is removed.⁶

8. Detention in an Inebriate Reformatory.—In certain cases where a person, who is a habitual drunkard, is convicted of an offence

¹ § 6 (2), (3), (4).

⁴ 1914 Act, § 9.

² *M'Intyre v. Henderson*, 1911, S.C. (J.) 73; 6 Adam 433.

⁵ 1908 Act, §§ 46 (3) and 77 (4).

³ § 6 (5).

⁶ *Gardner v. Dymock*, 1865, 5 Irv. 13; *Black v. Claxton*, 1906, 8 F. (J.) 69; 5 Adam 101.

which was due to drunkenness, he or she may be ordered to be detained in an inebriate reformatory, in lieu of, or in addition to, other punishment.

Under the Habitual Drunkards Act, 1879,¹ a "habitual drunkard" is defined as a person who, not being amenable to any jurisdiction in lunacy, is notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times (*a*) dangerous to himself, or herself, or others ; or (*b*) incapable of managing himself, or herself, and his or her affairs.

The Court, in addition to, or in substitution for, any other sentence, may order that a person be detained for a term not exceeding three years in any State inebriate reformatory, or in any certified inebriate reformatory, the managers of which are willing to receive him, subject to the following conditions :—

- (1) That such person is convicted on Indictment of an offence punishable with imprisonment, or penal servitude.
- (2) That the Court is satisfied from the evidence that the offence was committed under the influence of drink, or that drunkenness was a contributing cause of the offence ; and
- (3) That the offender admits that he is a habitual drunkard, or is found by the jury to be such.²

In proceedings under an Indictment, where the statutory provision is to be made use of, the accused, if he is to plead, must plead guilty to the offence libelled, and also admit that he is a habitual drunkard. If he does not plead guilty, the jury at the second diet is in the first place sworn, and the accused is then tried on so much only of the Indictment as charges the offence. If he is found guilty, the same jury, unless the accused admits that he is a habitual drunkard, is resworn to inquire whether he is such. Where at the first diet he pleads guilty to the offence, but denies that he is a habitual drunkard, the plea is recorded, and at the second diet the jury is sworn to inquire whether he is a habitual drunkard.³

In preparing an Indictment in a case where it is expected that the procedure under this statute will be adopted, care must be taken to libel (1) that the offence was committed under the influence of drink, or that drunkenness was a contributing cause of the offence ; and (2) that the accused is a habitual drunkard.

In every case, the question whether the offence has, in the sense of the section, resulted from drink or drunkenness, is solely for the Court. If the accused pleads guilty as libelled, the plea is held to be evidence within the meaning of the Act enabling the Court to

¹ § 3.² Inebriates Act, 1898 (61 & 62 Vict. c. 60), § 23.³ *Ibid.*

determine this question. Where he does not plead guilty, the Court decides the point by the evidence adduced at the trial.

Except in the case of a serious offence, persons ought not to be arrested and tried upon a fresh charge while undergoing a sentence of detention in an inebriate reformatory. In the case of a serious offence, the Court should be asked to order the sentence to run as from and after the expiry of the period of detention in the reformatory.

The forms in the Appendix will explain the ordinary procedure in cases under the Inebriates Acts, 1879 to 1898.

9. Power of Mitigation.—Every Court, whether exercising Solemn or Summary Jurisdiction, has power to mitigate the penalties to which an accused person is liable, either at common law or in respect of the contravention of any statute, or of any order, by-law, rule, or regulation having statutory authority.

In proceedings in respect of any statutory contravention tried under the 1908 Act which involves imprisonment with or without hard labour, the imposition of any pecuniary penalty, the finding of caution for good behaviour or otherwise, either singly or in combination with imprisonment or fine, the Court has in addition to the powers already conferred by Act of Parliament the following powers, viz. :—

- (1) To reduce the period of imprisonment.
- (2) To impose imprisonment without hard labour.
- (3) To substitute a fine not exceeding £25 for imprisonment, either with or without caution for good behaviour, not exceeding the amount and the period competent by law.
- (4) To substitute the finding of caution for a fine or imprisonment.
- (5) To reduce the amount of any pecuniary penalty.
- (6) To dispense with the finding of caution.¹

These powers are subject to two important limitations, viz. :—

- (1) Where any Act carries into effect a treaty, convention, or agreement with a foreign State, and such treaty, convention, or agreement stipulates for a fine of minimum amount, the Court is not entitled to reduce the amount of such fine below said minimum.
- (2) They do not extend to proceedings taken under any Act relating to any of His Majesty's regular or auxiliary forces.²

A Court has always power to modify the punishment applicable to a common law offence. This power is frequently exercised in cases when the accused suffers from mental weakness.³

¹ 1908 Act, §§ 43 and 77 (4).

² *Ibid.*

³ Chapter IV., *infra*, p. 288.

10. Aliens.—Aliens are now dealt with under the Aliens Restriction Acts, 1914¹ and 1919,² the Aliens Order, 1920, and the Disabilities Removal Act, 1925,³ together with the Act of Adjournal, 21st July 1920. The Act of Adjournal provides that all proceedings under § 12 (6) (b) of the Order of 1920 relating to the deportation of pauper aliens and aliens convicted abroad of extradition crimes shall be commenced by Complaint, and the provision of the 1908 Act and the 1887 Act apply so far as applicable.⁴

11. Expenses.—Expenses in Solemn Procedure.—In criminal cases falling under Solemn Procedure there is no award of expenses except in the rare case of private prosecution, where the private prosecutor may be made liable.⁵ The High Court awards expenses only when it is sitting as a Court of Review.⁶ The Criminal Appeal Act makes special provision for expenses in appeals under Solemn Procedure.⁷

Expenses in Summary Procedure.—Where the Court awards expenses, the finding regarding such expenses must be stated in the sentence or other judgment disposing of the case. Such expenses, where awarded to the prosecutor, are regulated by and restricted to the fees set forth in schedule G., and are recovered in the same manner as any penalty may be recovered. The Court may award expenses without imposing any penalty.⁸

Where expenses are awarded against the accused the decree is subject to the following limitations :—

- (a) Where the penalty or penalties imposed do not exceed £12 the total expenses decerned for must not exceed £3.
- (b) Where the penalty or penalties imposed do not exceed £12, but it appears to the Court that the reasonable expenses of the complainer's witnesses, together with the other expenses, exceed the sums hereinbefore allowed, the Court may direct the expenses of such witnesses to be paid in whole or in part out of the penalty.⁹

Expenses may be awarded to or against any private prosecutor, but cannot be awarded to or against any person prosecuting in the public interest, unless the statute or order, under which proceedings are taken, directly or by implication authorises such award.¹⁰ The Court may direct the expenses incurred by any prosecutor, public or private, to be met in whole or in part out of any penalty imposed.

¹ 4 & 5 Geo. V. c. 12.

² 9 & 10 Geo. V. c. 92

³ 15 & 16 Geo. V. c. 43.

⁴ See Appendix III., *infra*.

⁵ Hume ii. 127 ; Alison ii. 113.

⁶ *H.M. Adv. v. Aldred*, 1922, J.C. 13.

⁷ P. 122, *supra*.

⁸ 1908 Act, § 52.

⁹ *Ibid.* ; *Tough v. Mitchell*, *infra* ; *Stewart v. M'Niven*, *infra*.

¹⁰ *Lockwood v. Chartered Institute of Patent Agents*, 1913, S.C. (J.) 8,

Any expenses awarded against a prosecutor are recoverable by civil diligence as provided in the Act.¹

The Court (*a*) may award expenses without imposing any penalty, and (*b*) may direct expenses to be met in whole or in part out of any penalty imposed. This latter provision is specially applicable to prosecutions, such as those under the Night Poaching Act, in which any fines go to Exchequer, although the expenses of prosecution fall on the county. In cases of this nature, where a fine is imposed, it is well for the Court to order the expenses to be met out of the fine. Such expenses are regulated by schedule G. That schedule does not in terms apply to a case where expenses are awarded against a prosecutor, but in the somewhat rare case of the prosecutor being found liable in expenses it is usual for the Court to impose modified expenses not exceeding those which could have been awarded to the prosecutor. In special circumstances, however, the Court may allow expenses on the ordinary scale applicable to procedure in the Inferior Court, and remit the account for taxation.² Where an Act of Parliament authorises costs to be given against the accused, it is implied that the Court has a general power of awarding costs to either party on the view that the power to award costs against the accused being given, it is a fair and equitable inference that the prosecutor may be made liable if he fails in the prosecution.³

Illustrations.—Where there are several accused, the criterion for the expenses which may be competently awarded is not the *cumulo* penalties imposed, but the penalty imposed on each.⁴

Where the award of expenses was excessive but separable from rest of sentence, the conviction was suspended only in regard to expenses.⁵

Held that as, under the Cruelty to Animals Act, 1850, costs could by implication be awarded to the prosecutor, they could also be awarded against him.³

An inspector of weights and measures prosecuting under the Food and Drugs Acts is a public prosecutor, and expenses cannot be awarded to or against him in prosecutions under these Acts.⁶

Expenses in Proceedings for Review.—In stated cases the High Court has power to award such expenses, both in the High Court and in the previous proceedings, as they may think fit.⁷ Full expenses have been awarded in both Courts⁸ and in the High Court

¹ 1908 Act, § 52; *Ross*, 1869, 1 Coup. 336.

² *Lindsay v. J. & G. Cox Ltd.*, 1906, 44 S.L.R. 80.

³ *Todrick v. Wilson*, 1891, 18 R. (J.) 41; 3 White 28; following *Walker v. Bathgate*, 1873, 11 M. 956.

⁴ *Tough v. Mitchell*, 1886, 13 R. (J.) 44; 1 White 79.

⁵ *Stewart v. M'Niven*, 1891, 18 R. (J.) 36; 2 White 627.

⁶ *Mackirdy v. M'Kendrick*, 1897, 25 R. (J.) 49; 2 Adam 435.

⁷ 1908 Act, § 72.

⁸ *Walker v. Linton*, 1892, 20 R. (J.) 1; 3 White 329.

only,¹ but the usual practice is to modify the expenses.² In suspensions the expenses are usually modified.³ In one case the Court refused to modify in view of the inadequacy of the statutory penalties for the offence charged.⁴ The Court has power to direct that the expenses incurred by the prosecutor be paid out of the penalty which is imposed.⁵ Where by statute an accused person may be made liable in expenses the Court is entitled, if the accused is successful, to award him expenses against the prosecutor.⁶ Where a prosecutor consents to a conviction being set aside, the expenses allowed are three guineas.⁷

By statute, if the amount of the expenses found due has not been determined or modified, the account is remitted to the Auditor of the Court of Session to be taxed in the like manner and subject to the same regulations as in the Court of Session.⁸ A session fee is not a proper charge.⁹

¹ *Brown v. Neilson*, 1907, S.C. (J.) 3; 5 Adam 149; *Stewart v. Macpherson*, 1918, J.C. 96.

² *M'Intyre v. Linton*, 1876, 3 Coup. 319; *Maclaren* 394.

³ *Ibid.*

⁴ *Stewart v. Macpherson*, *supra*.

⁵ 1908 Act, § 52.

⁶ *Walker v. Bathgate*, 1873, 2 Coup. 460; *Todrick v. Wilson*, 1891, 3 White 28.

⁷ 1908 Act, § 73.

⁸ 58 & 59 Vict. c. 14, § 3; *Rochiciolli v. Walker*, 1916, S.C. (J.) 18.

⁹ *Ibid.*

CHAPTER II

SPECIAL TREATMENT OF YOUTHFUL OFFENDERS

THE law relating to the treatment of offenders under the age of sixteen years has been codified and amended by the Children Act, 1908.¹ The statute is a long one, and space does not admit of a full digest of its provisions, but certain parts of it are very frequently referred to in practice. The statutory language has been somewhat abbreviated, but as far as possible the actual words of the Act are used. The section numbers refer to the Children Act.

1. Definitions.—The Act furnishes the following definitions of these terms, which apply unless the context otherwise requires :—

“ Child,” a person under the age of fourteen years.

“ Young person,” a person who is fourteen years of age or upwards and under the age of sixteen years.

Illustration.—A panel convicted of culpable homicide attained the age of sixteen between the date of the offence and the date of the conviction. Section 102 (2) of the Act enacts: “ A young person shall not be sentenced to penal servitude for any offence.” It was held that the panel could legally be sentenced to penal servitude.²

“ Guardian,” in relation to a child, young person, or youthful offender, includes any person who, in the opinion of the Court, has for the time being the charge of, or control over, such child, young person, or youthful offender.

“ Legal guardian ” in relation to an infant, child, young person, or youthful offender, means a person appointed, according to law, to be his guardian by deed or will, or by order of a Court of competent jurisdiction.³

2. Presumption and Determination of Age.—Where a person is brought before any Court otherwise than for the purpose of giving evidence, and it appears to the Court that he is a child or a young person, within the meaning of the above definition, the Court must make due inquiry as to his age, and take such evidence as may be

¹ 8 Edw. VII. c. 67.

² *H.M. Adv. v. Crawford*, 1918, J.C. 1.

³ § 131.

forthcoming at the hearing of the case. An order or judgment of the Court is not invalidated by subsequent proof that such person's age has not been correctly stated to the Court. For the purposes of the Act the age presumed or declared by the Court is deemed to be the true age. If it appears to the Court that the person is of the age of sixteen years or upwards, he is not to be considered a child or a young person.¹

The section contains other provisions as to the presumption of age in offences under the Act, but as these do not affect general procedure they may be omitted here.

3. Juvenile Courts.—One of the principal reforms sought to be attained by the Act was the prevention of the contamination of young persons through their being brought into contact with criminals, or made familiar with histories of criminal offences. With this object, certain important changes in the mode of conducting Criminal Courts have been introduced.

No child (other than an infant in arms) is permitted to be present in Court during the trial of any person charged with an offence, or during any proceedings preliminary thereto. If so present, he shall be ordered to be removed, unless he is the person charged with the alleged offence, or during such time as his presence is required as a witness, or otherwise for the purposes of justice.² This provision does not apply to messengers, clerks, and other persons required to attend at any Court for purposes connected with their employment.³ It will be remembered that a child is a person under the age of fourteen years.

A Court of Summary Jurisdiction, when hearing charges against children or young persons, or when hearing applications for orders or licences relating to a child or young person at which the attendance of the child or young person is required, shall, unless the child or young person is charged jointly with any other person not being a child or young person, sit either in a different building or room from that in which the ordinary sittings of the Court are held, or on different days or at different times from those at which the ordinary sittings are held. A Court of Summary Jurisdiction so sitting is referred to as a Juvenile Court.⁴

Where in the course of any proceedings in a Juvenile Court it appears to the Court that the person charged or to whom the proceedings relate is of the age of sixteen years or upwards, or where in the course of any proceedings in any Court of Summary Jurisdiction other than a Juvenile Court it appears that the person charged or to whom the proceedings relate is under the age of sixteen

¹ § 123.

² § 115.

³ *Ibid.*

⁴ § 111 (1).

years, the Court, if it thinks it undesirable to adjourn the case, may proceed with the hearing and determination of the case.¹

Provision has to be made for preventing persons apparently under the age of sixteen years, whilst being conveyed to or from Court, or whilst waiting before or after their attendance in Court, from associating with adults charged with any offence other than an offence with which the person apparently under the age of sixteen years is jointly charged.²

In a Juvenile Court, no person other than the members and officers of the Court and the parties to the case, their solicitors and counsel, and other persons directly concerned in the case, can, except by leave of the Court, be allowed to attend.³ *Bona-fide* representatives of a newspaper or news agency must not be excluded.⁴

4. Apprehension and Bail.—Where a person apparently under the age of sixteen years is apprehended with or without warrant, and cannot be brought forthwith before a Court of Summary Jurisdiction, a superintendent or inspector of police, or other officer of police of equal or superior rank, or the officer in charge of the police station to which such person is brought, must inquire into the case, and may in any case, and shall—

- (a) Unless the charge is one of homicide or other grave crime ; or
- (b) Unless it is necessary in the interest of such person to remove him from association with any reputed criminal or prostitute ; or
- (c) Unless the officer has reason to believe that the release of such person would defeat the ends of justice—

release such person on a bond, with or without sureties, for such an amount as will, in the opinion of the officer, secure the attendance of such person upon the hearing of the charge, being entered into by him, or by his parent or guardian.⁵

Where a person apparently under the age of sixteen years having been apprehended is not so released, the officer of police must cause him to be detained in a place of detention provided by the proper authority, until he can be brought before a Court of Summary Jurisdiction, unless the officer certifies—

- (a) That it is impracticable to do so ; or
- (b) That the offender is of so unruly a character that he cannot be safely so detained ; or
- (c) That by reason of the offender's state of health or of his mental or bodily condition it is inadvisable so to detain him.

¹ § 111 (2).

⁴ *Ibid.*

² § 111 (3).

³ § 111 (4).

⁵ § 94.

This certificate must be produced to the Court before which the person is brought.¹

It is the duty of the police authority to make arrangements for preventing, so far as practicable, a child or young person, while being detained in a police station, from associating with an adult, other than a relative, charged with an offence.²

5. Remand or Adjournment and Committal.—A Court of Summary Jurisdiction, on remanding or adjournment of the hearing, or committing for trial, a child or young person who is not released on bail, must, instead of committing him to prison, commit him to custody in a place of detention provided under the Act and named in the warrant, to be there detained for the period for which he is remanded, or until he is thence delivered in due course of law.³

In the case of a young person (that is to say, a person between fourteen and sixteen years), it is not obligatory on the Court so to commit him, if the Court certifies that he is of so unruly a character that he cannot be safely so committed, or that he is of so depraved a character that he is not a fit person to be so detained.⁴

A commitment under § 97 may be varied or, in the case of a young person who proves to be of so unruly a character that he cannot be safely detained in such custody, or to be of so depraved a character that he is not a fit person to be so detained, revoked by any Court of Summary Jurisdiction acting in or for the place in or for which the Court which made the order acted. If it is revoked the young person may be committed to prison.⁵

6. Attendance of Parent or Guardian.—Where a child or young person is charged with any offence, or where a child is brought before a Court of Summary Jurisdiction, on an application for an order to send him to a certified industrial school, his parent or guardian may in any case, and shall if he can be found and resides within a reasonable distance and the person so charged or brought before the Court is a child, be required to attend at the Court before which the case is heard or determined during all the stages of the proceedings, unless the Court is satisfied that it would be unreasonable to require his attendance.⁶ It is enough under this section if the parent has reasonable notice of the diets in the proceedings against the child, and it is not necessary formally to cite the parent to attend the Court.⁷

Where the child or young person is arrested, the constable by whom he is arrested, or the officer of police in charge of the police

¹ § 95.

⁵ § 97 (2).

² § 96.

⁶ § 98 (1).

³ § 97 (1).

⁴ *Ibid.*

⁷ *White v. Jeans*, 1911, S.C. (J.) 88; 6 Adam 489; *Montgomery v. Gray*, 1915, S.C. (J.), 94; 7 Adam 681.

station to which he is brought, must cause the parent or guardian of the child or young person, if he can be found, to be warned to attend at the Court before which the child or young person will appear.¹

The parent or guardian whose attendance is required under the 98th section is the parent or guardian having the actual possession and control of the child or young person; but if that person is not the father, the attendance of the father may also be required.²

The attendance of the parent of a child or young person is not to be required in any case where the child or young person was before the institution of the proceedings removed from the custody or charge of his parent by an order of a Court of Justice.³

The method of enforcing the attendance of a parent and guardian, and enabling him to take part in the proceedings, and to be made the subject of orders of the Court, is to be settled by rules framed in terms of § 98 (3).

7. Disposal of Case.—The case against a child or young person is heard by the Court in the manner already indicated. If the Court is satisfied of his guilt, it must take into consideration the several ways in which, under the provisions of the Children Act, or any other Act, the case should be dealt with. These several ways are as under :—

- (a) By dismissing the charge.⁴
- (b) By discharging the offender on his entering into a bond.⁵
- (c) By so discharging the offender and placing him under the supervision of a probation officer.⁶
- (d) By committing the offender to the care of a relative or other fit person.⁷
- (e) By sending the offender to an industrial school.⁸
- (f) By sending the offender to a reformatory school.⁹
- (g) By ordering the offender to be whipped.¹⁰
- (h) By ordering the offender to pay a fine, damages, or costs.¹¹
- (i) By ordering the parent or guardian of the offender to pay a fine, damages, or costs.¹²
- (j) By ordering the parent or guardian of the offender to give security for his good behaviour.¹³
- (k) By committing the offender to custody in a place of detention provided under the Act.¹⁴

¹ § 98 (2).

² § 98 (4).

³ § 98 (5).

⁴ P. 241.

⁵ P. 241.

⁶ P. 241 *sq.*

⁷ P. 241 *sq.*

⁸ P. 259.

⁹ P. 258.

¹⁰ P. 233.

¹¹ Pp. 256, 257.

¹² P. 256.

¹³ P. 256.

¹⁴ P. 255.

- (l) Where the offender is a young person by sentencing him to imprisonment.¹
- (m) By dealing with the case in any other manner in which it may be legally dealt with.²

But nothing in that section is to be construed as authorising the Court to deal with any case in any manner in which it could not deal with it apart from the section.³

8. Serious Crimes.—It sometimes happens that a child or young person is convicted of a serious crime, which would render an adult liable to sentence of death, or penal servitude, or imprisonment. The Children Act defines in what manner such an offender is to be dealt with.

In the first place, it is laid down that a youthful offender shall not be sentenced to certain forms of punishment; it is then provided how he may be treated.

A child must not be sentenced to imprisonment or penal servitude for any offence, or committed to prison in default of payment of a fine, damages, or costs.⁴

A young person must not be sentenced to penal servitude for any offence.⁵

A young person must not be sentenced to imprisonment for an offence, or committed to prison in default of payment of a fine, damages, or costs, unless the Court certifies that he is of so unruly a character that he cannot be detained in a place of detention provided under the Act, or that he is of so depraved a character that he is not a fit person to be so detained.⁶

Sentence of death must not be pronounced on, or recorded against, a child or young person; but in lieu thereof the Court must sentence him to be detained during His Majesty's pleasure. If so sentenced, he is, notwithstanding anything in the other provisions of the Act, liable to be detained in such place and under such conditions as the Secretary of State may direct, and whilst so detained shall be deemed to be in legal custody.⁷

Where a child or young person is convicted on Indictment of an attempt to murder, or of culpable homicide, or of wounding with intent to do grievous bodily harm, and the Court is of opinion that no punishment which, under the provisions of the Children Act, it is authorised to inflict is sufficient, the Court may sentence the offender to be detained for such period as may be specified in the sentence. Where such a sentence is passed, the child or young

¹ Pp. 231, 255 *sq.*

² § 107.

³ *Ibid.*

⁴ § 102.

⁵ *Ibid.*, *H.M. Adv. v. Crawford*, 1918, J.C. 1.

⁶ § 102.

⁷ § 103.

person shall, during that period, notwithstanding anything in the other provisions of the Act, be liable to be detained in such place and on such conditions as the Secretary of State may direct, and whilst so detained shall be deemed to be in legal custody.¹

A person in detention pursuant to the directions of the Secretary of State may, at any time, be discharged by the Secretary on licence. The licence is in such form and may contain such conditions as the Secretary may direct, and may at any time be revoked or varied by the Secretary. Where a licence has been revoked, the person to whom it related shall return to such place as the Secretary of State may direct. If he fails to do so, he may be apprehended without warrant, and taken to that place.²

Where a child or young person is convicted of an offence punishable, in the case of an adult, with penal servitude or imprisonment, or would, if he were an adult, be liable to be imprisoned in default of payment of any fine, damages, or costs, and the Court considers that none of the other methods in which the case may legally be dealt with is suitable, the Court may, in lieu of sentencing him to imprisonment or committing him to prison, order that he be committed to custody in a place of detention provided under the Act and named in the order, for such term as may be specified in the order, not exceeding the term for which he might, but for the Act, be sentenced to imprisonment or committed to prison. The term must not in any case exceed one month.³

9. Fine, Damages, and Expenses.—Where a child or young person is charged before any Court with any offence for the commission of which a fine, damages, or costs may be imposed, and the Court is of opinion that the case would be best met by the imposition of a fine, damages, or costs, whether with or without any other punishment, the Court may in any case, and shall if the offender is a child, order that the fine, damages, or costs awarded be paid by the parent or guardian of the child or young person, instead of by the child or young person, unless the Court is satisfied that the parent or guardian cannot be found, or that he has not conducted to the commission of the offence by neglecting to exercise due care of the child or young person.⁴

Where a child or young person is charged with any offence, the Court may order his parent or guardian to give security for his good behaviour.⁵

Where a Court of Summary Jurisdiction thinks that a charge against a child or young person is proved, the Court may make an order on the parent or guardian for the payment of damages or

¹ § 104.

⁴ § 99 (1).

² § 105.

³ § 106.

⁵ § 99 (2).

costs, or requiring him to give security for good behaviour, without proceeding to the conviction of the child or young person.¹

An order under § 99 may be made against a parent or guardian who, having been required to attend, has failed to do so ; but, with that exception, no such order shall be made without giving the parent or guardian an opportunity of being heard.²

Any sums imposed and ordered to be paid by a parent or guardian under § 99, or on forfeiture of any security given by him under that section, may be recovered from him by civil diligence or imprisonment in like manner as if the order had been made on the conviction of the parent or guardian of the offence with which the child or young person was charged.³

The method of dealing with a child or young person who is convicted of a more serious crime, as to which the Court thinks the above procedure would not be suitable, has been explained.⁴

Where a child or young person is himself ordered by a Court of Summary Jurisdiction to pay costs in addition to a fine, the amount of the costs so ordered to be paid must in no case exceed the amount of the fine, and (except so far as the Court may think fit expressly to order otherwise) all fees payable or paid by the complainor or prosecutor in excess of the amount of costs so ordered to be paid, shall be remitted or repaid to him. The Court may also order the fine or any part thereof to be paid to the prosecutor in or towards the payment of his costs.⁵

10. Reformatory and Industrial Schools—Preliminary Inquiry.—

If the prosecutor perceives that in a particular case there is a likelihood of the Court ordering the offender to be detained in a reformatory or industrial school, he should procure before the trial reliable information, as far as he can do so, on the following points :—

- (1) The date of birth of the offender.
- (2) His religious persuasion — whether Protestant, Roman Catholic, or otherwise.
- (3) The public authority whose duty it is to provide for the offender's reception and maintenance in a certified school.
- (4) Whether his parent or guardian is in a position to contribute towards his maintenance in the certified school.
- (5) The name of a certified school (reformatory or industrial, as the case may be), the managers of which are willing to receive the offender ; and
- (6) The child's antecedent history at school.

He should also see that intimation of the trial is given to the

¹ § 99 (3).

⁴ *Supra*, p. 255.

² § 99 (4).

³ § 99 (5).

⁵ § 101.

parent or guardian of the offender,¹ and also, in the case of committal to an industrial school, to the School Board² which will be liable under the Act to contribute towards the maintenance of the offender in the school.

It may be broadly indicated that offenders under the age of twelve years can be committed to industrial schools, and offenders between the ages of twelve and sixteen years can be committed to reformatory schools. Offenders of twelve or thirteen years are, in certain circumstances, eligible for either.

Classes of Certified Schools.—The Act defines the two groups of schools for industrial training in the following terms :—

“ Reformatory School ” means a school for the industrial training of youthful offenders in which youthful offenders are lodged, clothed, and fed, as well as taught.

“ Industrial School ” means a school for the industrial training of children, in which children are lodged, clothed, and fed, as well as taught.

“ Certified School ” means a reformatory or industrial school which is certified in accordance with the provisions of the Act.³

Committal to Reformatory School.—Where a youthful offender, who in the opinion of the Court before which he is charged is *twelve years of age or upwards, but less than sixteen years of age*, is convicted, whether on Indictment or on Summary complaint, of an offence punishable in the case of an adult with penal servitude or imprisonment, the Court may, in addition to, or in lieu of, sentencing him according to law to any other punishment, order that he be sent to a certified reformatory school.⁴

Where the offender is ordered to be sent to a certified reformatory school, he cannot in addition be sentenced to imprisonment.⁵

Where such an order has been made in respect of a youthful offender of the age of fourteen years or upwards, and no certified reformatory school can be found the managers of which are willing to receive him, the Secretary for Scotland may order the offender to be brought before the Court which made the order, or any Court having the like jurisdiction, and that Court may, in lieu of the detention order, make such order or pass such sentence as the Court may determine, so, however, that the order or sentence shall be such as might have been originally made or passed in respect of the offence.⁶

¹ *White v. Jeans*, 1911, S.C. (J.) 88 ; 6 Adam 489 ; *Montgomery v. Gray*, 1915, S.C. (J.) 94 ; 7 Adam 681.

² *A.B. v. Howman*, 1917, J.C. 26 ; see *infra*.

³ § 44.

⁴ § 57 (1). See p. 348, *infra*.

⁵ *Ibid*.

⁶ §§ 57 (2) and 132.

Committal to an Industrial School.—The 58th section of the Act describes many classes of children who are liable, without having committed a criminal offence, to be sent to an industrial school—such as children found wandering, begging, or otherwise lapsing into evil courses. These provisions have nothing to do with criminal procedure, and therefore it is only necessary here to consider such committal as a method of dealing with a child charged with an offence.

Where a child apparently *under the age of twelve years* is charged on Indictment or on a Summary complaint with an offence punishable in the case of an adult by penal servitude or a less punishment, the Court, if satisfied on inquiry that it is expedient so to deal with the child, may order him to be sent to a certified industrial school.¹

Where a child apparently *of the age of twelve or thirteen years*, who has not previously been convicted, is charged on a Summary complaint with an offence punishable in the case of an adult by penal servitude or a less punishment, and the Court is satisfied that the child should be sent to a certified school, but, having regard to the special circumstances of the case, should not be sent to a certified reformatory school, and is also satisfied that the character and antecedents of the child are such that he will not exercise an evil influence over the other children in a certified industrial school, the Court may order the child to be sent to a certified industrial school, having previously ascertained that the managers are willing to receive the child.²

Where under the 58th section a Court is empowered to order a child to be sent to a certified industrial school, the Court, in lieu of ordering him to be so sent, may, in accordance with the provisions of Part II. of the Act, make an order for the committal of the child to the care of a relative or other fit person named by the Court, and the provisions of that Part shall, so far as applicable, apply as if the order were an order under that Part.³

Where such an order is made for the committal of a child or young person to the care of a relative or other fit person named by the Court, the Court may, in addition to such order, make an order under the Probation of Offenders Act, 1907, that the child or young person be placed under the supervision of a probation officer. The bond into which the child, if not charged with an offence, or the young person is required to enter, shall bind him to appear and submit to the further order of the Court.⁴

Deferred Committals.—It is not necessary that committal to a reformatory or industrial school should take immediate effect. An order of a Court ordering a youthful offender or child to be sent to

¹ §§ 58 (2) and 132.

³ § 58 (7).

² §§ 58 (3) and 132. See p. 349, *infra*.

⁴ § 60.

and detained in a certified school (in the Act referred to as a *detention order*) may, if the Court think fit, be made to take effect either immediately or at any later date specified therein, regard being had to the age or health of the youthful offender or child.¹

Naming of School in Order.—If possible, the certified school should be named in the order, but this is not essential. The school, to which a youthful offender or child is to be sent under a detention order, is such school as may be specified in the order, being some certified school (whether situate within the jurisdiction of the Court making the order or not) the managers of which are willing to receive the youthful offender or child. If, however, it is found impossible to specify the school in the detention order, the school shall, subject to the provisions of the Act with respect to the determination of the place of residence of a youthful offender or child, be such as the Court which made the order, or any member thereof, or any other Court having jurisdiction in the place where the Court which made the order sat, may by endorsement on the detention order direct.²

Religious Persuasion of Offender.—It has already been explained that the religious persuasion of the offender should, if possible, be ascertained before the trial. The Court, in determining the certified school to which a youthful offender or child is to be sent, must endeavour to ascertain the religious persuasion to which the offender or child belongs. The detention order must, where practicable, specify the religious persuasion to which the offender or child appears to belong, and a school conducted in accordance with that persuasion must, where practicable, be selected.³

Committal to a Special School.—Where the Court is satisfied that a youthful offender or child is, by reason of mental or physical defect, incapable of receiving proper benefit from industrial training in an ordinary certified school, but is not incapable by reason of such defect of receiving benefit from industrial training in a certified school where special provision is made for the training of youthful offenders or children suffering from such defect, the detention order (if any) shall be for detention in a school where such provision is made.⁴

Interim Detention of Offender.—Provision is made for the interim detention of the offender, pending arrangements for his committal. It is enacted that if—

- (a) A detention order is made but is not to take effect immediately ; or

¹ § 61.

² §§ 62 and 132.

³ § 66 (1).

⁴ § 62.

- (b) At the time specified for the order to take effect the youthful offender or child is unfit to be sent to a certified school ; or
- (c) The school to which the youthful offender or child is to be sent cannot be ascertained until inquiry has been made,

the Court may make an order committing him either to custody in any place to which he might be committed on remand, or to the custody of a relative or other fit person, and he is kept in that custody accordingly until he is sent to a certified school in pursuance of the detention order.¹

Transmission of Child to School.—The person by whom any youthful offender or child ordered to be sent to a certified school is detained must at the appointed time deliver him into the custody of the constable or other person responsible for his conveyance to school, who shall deliver him to the superintendent or other person in charge of the school in which he is to be detained, together with the order or other document in pursuance of which the offender or child was detained and is sent to the school. The detention order in pursuance of which the youthful offender or child is sent to a certified school is a sufficient authority for his conveyance to and detention in the school or any other school to which he is transferred.²

Period of Detention.—The detention order must specify the time for which the youthful offender or child is to be detained in the school, being—

- (a) In the case of a youthful offender sent to a reformatory school, not less than three and not more than five years, but not in any case extending beyond the time when the youthful offender will, in the opinion of the Court, attain the age of nineteen years ; and
- (b) In the case of a child sent to an industrial school, such time as to the Court may seem proper for the teaching and training of the child, but not in any case extending beyond the time when the child will, in the opinion of the Court, attain the age of sixteen years.³

Provision for Maintenance.—Where a youthful offender is ordered to be sent to a certified reformatory school, it is the duty of the Council of the county or the burgh in which he resides (to be specified in the order) to provide for his reception and maintenance in a certified reformatory school suitable to the case, having regard to the requirements of the Act.

Where a child is ordered to be sent to a certified industrial school, it is the duty of the School Board of the district in which he resides

¹ § 63.

² § 64.

³ § 65.

(to be specified in the order) to provide for his reception and maintenance in a certified industrial school suitable to the case, having regard to the requirements of the Act.

For the purposes of the foregoing provisions a youthful offender or child is presumed to reside in the place where the offence was committed, unless it is proved that he resided in some other place.

Where the Court by which the detention order is made is the High Court of Justiciary, it must remit to a Court of Summary Jurisdiction for the place where the youthful offender or child was committed for trial, the determination of his place of residence.

Intimation to School Board.—An order for the detention of a child in a certified industrial school must not be made by a Court of Summary Jurisdiction unless the School Board, which by virtue of the order are responsible for providing for the reception and maintenance of the child in a certified school, have been given an opportunity of being heard.¹ So where a Sheriff pronounced a detention order and thereafter gave an opportunity to the School Board to be heard, the procedure was held to be incompetent.² In giving judgment in the case in which this point arose, Lord Salvesen said: "The School Board have undoubtedly an interest of their own to attend to in this matter—namely, their financial interest; but I do not think the statute would have been expressed in its present terms if that were the only interest. I can quite imagine that it may have been the intention of the Legislature to provide that no order for detention should be pronounced until the school antecedents of the child had been brought before the Sheriff; and the proper party to bring these antecedents before him would be the School Board. I can well imagine that the Sheriff might be influenced with regard to the sentence he pronounced by the consideration whether the child had had a good or bad antecedent history at school."³

Objections by School Board or Local Authority.—Where a local authority—that is to say, as respects reformatory schools the Council of a county or burgh, and as respects industrial schools a School Board—are aggrieved by the decision of a Court as to the place of residence of a youthful offender or child, they may within three months after the making of the detention order apply to the Sheriff acting in and for the place for which the Court which made the order or determined the place of residence acted. The Sheriff, on proof to his satisfaction that the youthful offender or child was resident in the area of another local authority, and after giving such other local authority an opportunity of being heard, may transfer the

¹ § 74.

² *A.B. v. Howman*, 1917, J.C. 23.

³ *Ibid.* at p. 26.

liability to maintain the youthful offender or child in a certified school to that other local authority, and may order that other authority to repay to the first-mentioned local authority any expenses incurred by them in respect of the youthful offender or child under the detention order. The first-mentioned local authority remains liable under the detention order until an order has been made transferring the liability to another local authority.¹

Contributions by Parent or Guardian.—The parent or other person liable to maintain a youthful offender or child ordered to be sent to and detained in a certified school must, if able to do so, contribute to his maintenance therein a sum not exceeding such sum as may be declared by Order in Council to represent approximately the average cost of maintenance of youthful offenders or children in the class of school to which such school belongs in the locality in which such school is situate.²

The persons liable to maintain a youthful offender, young person, or child, against whom an order to contribute to the maintenance of the youthful offender, young person, or child may be made, include his step-parent, and, if the Court having cognisance of the case thinks fit, a person cohabiting with his mother, whether or not the person so cohabiting is his putative father, and in the case of illegitimacy his putative father. Where the youthful offender, young person, or child is illegitimate, and a decree for aliment has previously been obtained on the application of his mother, the Court shall not (unless in view of the special circumstances of the case the Court thinks it desirable) make an order for contribution against the putative father, but may order the whole or any part of the payments accruing due under the decree to be made to the Chief Inspector of Reformatory and Industrial Schools or such other person as may be named in the order, to be applied by him towards the maintenance of the youthful offender, young person, or child.³

The Court by which a detention order is made must at the time of making that order, unless it considers that it is not in possession of the necessary information, make an order on such parent or other person for the payment to the chief inspector of such weekly sum, not exceeding the sum above specified, as, having regard to the ability of the parent or other person, seems reasonable, during the whole or any part of the time for which the offender or child is liable to be detained in the school.⁴ The Court making the detention order, if the High Court of Justiciary, may, if it thinks fit, remit the case to a Court of Summary Jurisdiction for the place where the offender or child was committed for trial, for the purpose of making an order under this section. Upon the case being so remitted, any such

¹ §§ 74 and 132.

² § 75 (1).

³ §§ 125 and 132.

⁴ § 75 (2).

Court of Summary Jurisdiction has power to make any such order as the Court which made the detention order might have made.¹

Every such order may specify the time during which the payment is to be made, or may direct the payment to be made until further order, and shall be enforceable as a decree for aliment.²

Provision as to service of an order on a person liable is made by Act of Adjournal, which also limits the time during which an application against an order may be made to twenty-eight days after service.³

Cost of Transmission.—The expense of conveying to any certified reformatory school any youthful offender who has been directed to be detained in such a school, and the expense of proper clothing for him requisite for his admission to the school, are defrayed out of moneys provided by Parliament.

The expense of conveying to a certified industrial school a child ordered to be sent there, is defrayed by the police authority by whom he is conveyed, and is deemed part of the current expenses of that authority.⁴

11. Day Industrial Schools.—The schools mentioned in the preceding pages are places of detention where the offender is not only trained industrially, but maintained. There are, however, day industrial schools, where an offender receives industrial training, but he resides and is maintained outside their walls. The Children Act makes provision for these, and they may be employed where they are available.

Any child authorised by Part IV. of the Act to be sent to a certified industrial school may, if the Court before which the child is brought thinks it expedient, be sent to a certified day industrial school.

Any child sent to a certified day industrial school by an order of a Court (other than an attendance order) may, during the period specified in the order, be there detained during such hours as may be authorised by the rules of the school approved by the Secretary for Scotland.

The school must be within such distance of the residence of the child as may be prescribed by Order in Council, but need not be situate within the jurisdiction of the Court making the order.⁵

Where a Court orders a child to be sent to a certified day industrial school, it must also order the parent of the child, or other person liable to maintain him, to contribute to his industrial training and

¹ § 75 (2) and 132.

² § 75 (3).

³ Act of Adjournal, 2nd June 1909.

⁴ § 76.

⁵ § 78.

meals in the school, such sum as is named in the order, not exceeding such sum as may be declared by Order in Council to represent approximately the average cost of industrial training and meals in day industrial schools in the locality in which the school to which the child is sent is situate. It is the duty of the School Board to obtain and enforce the order. Every sum paid under the order is paid over to the School Board in aid of their expenses for elementary education.¹

¹ § 82.

CHAPTER III

EVIDENCE

THE case for the prosecution and for the defence must be established by competent evidence. It would be quite out of place for us to attempt in a work of this kind to summarise the rules of evidence. Even in the smallest compass such a summary would occupy a large space, and yet in a compressed form would be of little practical service. Nevertheless, there are a few points of frequent occurrence as to which practitioners desire to have ready reference, and which it will be convenient to consider briefly.¹ It has only to be observed that our remarks, except when they are specially qualified, are equally applicable to both Solemn and Summary Procedure. Some specialties of Summary Procedure are explained at the conclusion of this chapter.

1. Admission or Rejection of Evidence.—It must be pointed out, in the first place, that as criminal procedure affects the liberty and reputation of the lieges, the rules of evidence applicable to it are more strict than those applicable to civil procedure. From this it follows that the admission of incompetent, or the rejection of competent, evidence, where such admission or rejection may possibly have led to an erroneous decision, is absolutely fatal to a conviction. This rule applies whether the error has been committed by admitting or rejecting witnesses or productions, or by allowing or disallowing questions.²

The effect of the incompetent admission or rejection of evidence which is not vital to the libel varies with the circumstances of each case. In a recent case³ where a railway servant, convicted of theft, appealed against the conviction on the ground that evidence of statements made by him to a stationmaster and two constables was wrongly admitted, it was held that the evidence was rightly admitted, but Lord Salvesen expressed the opinion that even if the evidence in question had been improperly admitted, the conviction would not fall to be quashed, as it did not appear that the conviction depended on that evidence. Lord Ormisdale expressed an opinion to the

¹ See Lewis, *Law of Evidence* in 1856, 2 Irv. 571; *Falconer v. Brown*, Scotland, p. 284 sq. 1893, 21 R. (J.) 1; 1 Adam 96.

² *Kerr*, 1853, 1 Irv. 213; *Burns*, ³ *Waddell v. Kinnaird*, 1922, J.C. 40.

contrary. In the earlier case of *Brown v. Macpherson*¹ it was held that where there was sufficient evidence against the accused apart from the evidence, the competency of which was in dispute, the Court was not entitled to set aside the conviction. But where one part of a charge was held to be irrelevant by the Court of Review, a conviction was suspended on the other part on the ground that it was at least probable that the accused had been prejudiced by the admission of evidence on the irrelevant charge.²

2. Primary and Secondary Evidence.—The *best evidence* must always be led. It is necessary, if possible, to produce the eye-witnesses of actions, the persons who made statements, and the principal documents to which reference is made. Sometimes it is impossible to do this. The persons may be dead, or the documents may have been destroyed. In such a case, the death or destruction is first proved. It is then competent to adduce witnesses who can prove statements made by the deceased persons, or produce copies of the destroyed documents and depone to their accuracy. Statements made outwith the presence of the accused person by some one who is not adduced as a witness cannot be received, even on proof that the person who made the statements has fled the country.³ Evidence taken on commission is incompetent in criminal trials.⁴

3. Admissions.—It is a peculiarity of criminal procedure that, apart from express statutory permission, of which there is an example in Summary proceedings,⁵ no fact can be established in a criminal trial by admissions on the part of the accused. This arises from the consideration that a person accused of crime is not in a position to make admissions with safety to himself. An exception is made as regards the statements of the accused in the declaration (if any) emitted at his judicial examination; but this concession is granted only in respect of the safeguards with which the examination is surrounded. As a matter of practice, minor points are sometimes agreed to be admitted, but this rests upon mutual convenience and not upon any principle of law. No material point is thus admitted in a trial under Indictment. So where admissions were made by the accused's agent the conviction was set aside.⁶ A modified plea which has been tendered and rejected cannot be founded on by the prosecutor.⁷

¹ 1918, J.C. 3.

⁵ P. 285, *infra*.

² *Winning v. Jeans*, 1909, S.C. (J.) 26; 6 Adam 1.

⁶ *Tullis v. Millar*, 1899, 1 F. (J.) 75; 3 Adam 3.

³ *H.M. Adv. v. M'Connell*, 1887, 1 White 412; *H.M. Adv. v. Monson*, 1893, 21 R. (J.) 5; 1 Adam 114.

⁷ *Cochran v. Ferguson*, 1882, 10 R. (J.) 18; 5 Coup. 169; *Brown v. Macpherson*, 1918, J.C. 3.

⁴ *H.M. Adv. v. Hunter*, 1905, 7 F. (J.) 73; 4 Adam 523.

4. Evidence of Accused and Husband or Wife of Accused.—One of the most marked peculiarities of criminal procedure is the incompetency of compelling the accused person, or the husband or wife of the accused person, to give evidence. Until 1898 these persons could not give evidence at all, except where the husband or wife was the person injured in the crime charged, or where they were made competent witnesses in a few special statutory offences. The statements of the accused person in his declaration were admitted as evidence, but, apart from special circumstances to which we shall afterwards advert, he could not be made a witness, directly or indirectly.

The Criminal Evidence Act, 1898, modified this. By that statute every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person.¹ It will be observed that this provision is limited to the defence; so that the accused, and the husband or wife of the accused, cannot be *compelled* to give evidence for the prosecution. The accused person may tender himself as a witness without having given notice to the prosecutor.² But if the husband or wife of the accused person is to be called as a witness for the defence, his or her name must be entered in the witness list in the usual way.³

The accused may not be called as a witness in pursuance of the Act except upon his own application.⁴

It is incompetent for the prosecutor to make any comment on the failure of the accused, or the wife or husband of the accused, to give evidence,⁵ but if the prosecutor does so, it does not necessarily follow that the conviction will be suspended. The Court has the right to comment on such failure.⁶

The wife or husband of the accused is, with the exception under-noted, not to be called as a witness except upon the application of the person accused.⁷

Illustrations.—In a police court prosecution, the prosecutor, in addressing the magistrate at the conclusion of the case, commented on the fact that accused had not given evidence on his own behalf. Held that although this was improper in view of § 1 of the 1898 Act, it did not warrant a suspension of the conviction. Lord Justice-Clerk Macdonald said: "It would undoubtedly be the duty of a judge to interfere with the prosecutor and check him at once if he made any such comment, and if the judge were trying the case with

¹ 61 & 62 Vict. c. 36, §§ 1 and 6.

² *Kennedy v. H.M. Adv.*, 1898, 1 F. (J.) 5; 2 Adam 588.

³ § 5.

⁴ § 1 (a).

⁵ § 1 (b); *Ross v. Boyd*, 1903, 5 F. (J.)

64; 4 Adam 184; *M'Attee v. Hogg*, 1903, 5 F. (J.) 67; 4 Adam 190.

⁶ *Brown v. Macpherson*, 1918, J.C. 3.

⁷ § 1 (c).

a jury, to tell the jury that they must pay no attention to what had been said ; but that the whole proceedings, for example, in a trial for murder, should, *ipso facto*, be nullified, and the accused liberated, as is contended for by the complainer, appears to me to be an extravagant contention. Certain cases were cited to us as being *in pari casu* with the present. But they are not so at all. All the cases noted were cases in which incompetent evidence had been led, and it is plain that a verdict cannot stand which proceeds, or must be assumed to proceed, on incompetent evidence."

Lord Trayner said : " Although any reference to the fact that the accused has not elected to give evidence is forbidden by the statute, and although I feel strongly that this statutory direction should be scrupulously observed, yet I cannot think that the mere fact that it has been transgressed entitles the accused person to acquittal."

Lord Moncreiff said : " It may indeed be that in certain circumstances, for instance in a trial before a jury, such comments by the prosecutor, suffered to be made without reproof from the judge, might be held to be sufficient to justify the Court in setting aside a verdict, but that question does not arise here. We must assume that the magistrate in deciding the case was in no way influenced by the remark if made." ¹

There are three exceptions in which the husband or wife of the accused person may be called as a witness either for the prosecution or defence, and without the consent of the person charged :—

- (1) As regards Scotland, in certain statutory proceedings as, *e.g.*, under the Poor Law (Scotland) Act, 1845, § 80 ; the Criminal Law Amendment Act, 1885 ² ; and the Children Act, 1908 ³ ; or
- (2) In cases where such husband or wife may be so called at common law, generally where he or she is the injured party.
- (3) By statute ⁴ the wife or husband of a person charged with bigamy may be called as a witness either for the prosecution or defence, and without the consent of the person charged.

If called as a witness, neither husband nor wife can be compelled to disclose any communication made to him or her by the other spouse during the marriage.⁵

If the accused person tenders himself as a witness, he may be asked any question in cross-examination, notwithstanding that it

¹ *Ross v. Boyd*, *supra*.

² § 4.

³ *H.M. Adv. v. Lee*, 1923, J.C. 1.

⁴ Criminal Justice Administration Act, 1914, § 27 (3).

⁵ § 1 (d).

would tend to incriminate him as to the offence charged.¹ He ought not to be asked, and if asked, is not required to answer, any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that wherewith he is then charged, or is of bad character.² To this there are four exceptions:—

- (1) If such proof is admissible evidence to show that he is guilty of the offence with which he is charged;
- (2) If he has personally, or by his agent, asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character;
- (3) If the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor, or the witnesses for the prosecution³; or
- (4) If the accused person has given evidence against any other person charged with the same offence.⁴

Where several persons are charged under one libel, and one of them, in giving evidence for himself, makes statements which incriminate another of the accused, the accused person so incriminated has a right to cross-examine the person giving evidence.⁵ So where two persons were charged together of sheep stealing, and the Sheriff-Substitute found nothing in the evidence of either of the accused tending to incriminate the other, it was held that neither co-accused was entitled to cross-examine the other.⁶ But there may be cases in which it would be the duty of the judge to allow the cross-examination when the effect of the evidence in incriminating the other co-accused is doubtful.⁷

It may be remarked generally that if the accused person, or his agent, considers a question incompetent, he must object to it at the time. The accused cannot answer it and then object to it at a later date.⁸ But it must be remembered that the statute provides that the accused is not to be asked an incriminating question, and it would appear that the judge ought *ex proprio motu* to disallow any such question.⁹

Every person called as a witness in pursuance of the Act must, unless otherwise ordered by the Court, give his evidence from the witness-box, or other place from which other witnesses give their evidence.¹⁰

¹ § 1 (e).

² § 1 (f).

³ *R. v. Charnock*, 1900, 1 Q.B. 474; *R. v. Rouse*, 1904, 1 K.B. 184; and *R. v. Bridgewater*, 1905, 1 K.B. 131.

⁴ *Ibid.*

⁵ *R. v. Hadwen*, 1902, 1 K.B. 882; *Hackston v. Millar*, 1906, 8 F. (J.) 52; 5 Adam 37.

⁶ *Gemmell v. M'Niven*, 1928, J.C. 5.

⁷ *Ibid.*, per L.J.G. Clyde at 9.

⁸ *Anderson v. Macfarlane*, 1899, 1 F. (J.) 36; 2 Adam 644.

⁹ *Lewis on Evidence*, p. 305; cf. *Cook v. Cook*, 1876, 4 R. 78.

¹⁰ § 1 (g).

The Act does not affect any right of the person charged to make a statement without being sworn.¹

Where the only witness to the facts of the case called by the defence is the person charged, he must be called as a witness immediately after the close of the evidence for the prosecution.² It is, as a rule, preferable that he should be called as the first witness for the defence.

5. Evidence of Statements by Accused.—Nothing short of a judicial admission of guilt by his pleading guilty in open Court will serve of itself to convict a person accused of crime ; but to a certain extent his extra-judicial statements are admissible in evidence. It is impossible to go fully into the question here ; but it may be briefly noted that, *inter alia*, the following statements are admissible as evidence against the accused :—

Judicial Declaration.—Statements in his valid judicial declaration : The accused is not entitled to have the declaration read as evidence in his favour,³ but if a request is made by the accused it is rarely refused. If there are two or more declarations and one is read, all must be read.⁴ The declaration of one accused is not as a rule evidence against a co-accused.⁵

Previous Proceedings.—Statements made by him on oath in previous proceedings, civil or criminal, or, for example, at a Fatal Accident Inquiry.⁶

Statements on Apprehension and to Prison Officials.—Statements to police constables, made freely and voluntarily, at the time of, or shortly after, apprehension, after he had been informed of the charge against him, and without unreasonable interrogation, or inducement by threats, bribes, or false representations.⁷ Statements to prison officials made voluntarily, after full and unambiguous warning, and without eavesdropping or trickery.⁸ Where a charge has not yet been made but a person is merely being detained on suspicion, the Court ought to be jealous to safeguard that person's rights.⁹ The value of such statements depends to a very great extent on the circumstances under

¹ § 1 (*h*).

² § 2.

³ *Potts*, 1842, 1 Broun 497.

⁴ *Loch*, 1837, 1 Swin. 494.

⁵ *Milne*, 1866, 5 Irv. 229.

⁶ *Banaghan v. H.M. Adv.*, 1888, 15 R. (J.) 39 ; 1 White 566 ; *M'Govern v. Auld*, 1894, 21 R. (J.) 69 ; 1 Adam 449.

⁷ *Gracie v. Stuart*, 1884, 11 R. (J.) 22 ; 5 Coup. 379 ; *Hodgson v. Macpherson*, 1913, S.C. (J.) 68 ; 7 Adam 118 ; *Brown*

v. Macpherson, 1918, J.C. 3 ; *Costello v. Macpherson*, 1922, J.C. 9 ; *H.M. Adv. v. M'Fadyen*, 1926, J.C. 93.

⁸ *M'Rae v. Blair*, 1856, 2 Irv. 568 ; *Wyllie*, 1858, 3 Irv. 218.

⁹ *H.M. Adv. v. Aitken*, 1926, J.C. 83. In this case the law was carefully considered, and Lord Anderson made some important observations on the subject of statements made by a prisoner.

which they are made.¹ It may be laid down as a general rule that they are not admissible in evidence unless they are freely and voluntarily made. Accordingly, statements made in answer to false representations by a police official have been rejected.² Confessions made to police or prison officials after the accused has been committed are generally inadmissible, as the proper course is for the prisoner to emit a declaration.³ But if the accused persists in making a statement despite the warning that it may be used against him, it may be admitted. If the accused is on bail and makes a statement to the police, such statement is admissible.⁴

Statements to Other Persons.—Statements to a clergyman, which have not been made to him under the seal of the confessional,⁵ or to a police surgeon⁶; statements to a superior officer, made voluntarily, and not in answer to the officer's questions (but not statements in the nature of a report made in the ordinary course of duty⁷).

Res gestæ.—It may be said generally that all statements made by the accused at the time of the offence may be proved.⁸ If the statements are connected with the crime in some relevant way they are admissible, being part of the *res gestæ*. So long as the period within which the statements were made is that of the commission of the crime there is no difficulty, but the rules as to statements made before or after the crime have been the subject of many conflicting decisions. A narrative dictated before the crime by the accused to a friend, in order that the latter might embody it in a letter, was admitted in evidence, although the letter written was not produced.⁹ Expressions indicating murderous intent, uttered by the panel two years before a murder, have been allowed to be proved¹⁰; and words used by the accused twenty-four hours after a murder, betraying anger against the murdered woman, were held to be competent evidence against him, as matter arising *de recenti*, and, in fact, forming part of the *res gestæ*.¹¹

In charges of rioting, it may be proved that the accused, before the outbreak, had addressed the people, instigating and inciting them to

¹ *Russell v. Paton*, 1902, 4 F. (J.) 77;
3 Adam 639; *H.M. Adv. v. Aitken*,
supra.

² *Bryce*, 1864, 4 Irv. 506; *Kerr v.*
Mackay, 1853, 1 Irv. 213.

³ *Bethune*, 1856, 2 Irv. 457.

⁴ *Smith v. Lamb*, 1888, 15 R. (J.) 54;
1 White 600.

⁵ *Cuthbert*, 1842, 1 Broun 311.

⁶ *H.M. Adv. v. Duff*, 1910, 6 Adam
248.

⁷ *Robertson*, 1853, 1 Irv. 219; *Waddell*
v. Kinnaird, 1922, J.C. 40.

⁸ *Macdonald* 474

⁹ *Downie*, 1865, 5 Irv. 202.

¹⁰ *Ross*, 1859, 3 Irv. 434.

¹¹ *Stewart*, 1855, 2 Irv. 166.

lawless acts¹; but, on the other hand, a prisoner so charged was not permitted to lead evidence that prior to the riotous assembly he had advised certain individuals to have nothing to do with it.² Where a woman was charged with child murder, she was not allowed to put her own letters in evidence in order to prove that she was ignorant of the probable date of birth and that her confinement came suddenly upon her.³ In a murder case proof of threats made fourteen days prior to the murder was admitted.⁴ Again, it has to be remarked that, while the law admits the voluntary statements of the accused as evidence against him, it jealously guards him from the consequences of his admissions made involuntarily, or in answer to unfair questioning. Thus, where a woman charged with child murder had, in a burst of confidence induced by an indirect question, made compromising statements to the wife of a police constable in whose charge she had been left, proof of these was rejected⁵; and the same course was adopted towards admissions made by the panel to an Inspector of Poor after repeated applications and under threats.⁶ In exculpation, the statements of an accused person are not proof of the facts, but have frequently been admitted for the purpose of showing that he had from the outset denied guilt, or told a consistent tale.⁷

6. Evidence of Co-accused.—We have hitherto been considering the admissibility of the evidence of a single accused person, either *direct*, by his tendering himself as a witness, or *indirect*, through previous statements which he has made. We must now consider the allied question of the admissibility of the evidence of one accused person against another.

There is no general rule that the evidence of *socii criminis* is of itself sufficient to convict a person charged with crime.⁸ It is desirable that such evidence should be corroborated on material points by other witnesses or productions.

The evidence of a co-accused is at all times received with some hesitation, and there have been many decisions on the subject. Apart from the Act of 1898, which we have already considered,⁹ the following points may be mentioned :—

- (1) A person convicted under a separate libel and at a different diet of the same crime, or of an offence arising out of the

¹ *H.M. Adv. v. Macrae*, 1888, 15 R. (J.) 33; 1 White 543.

² *H.M. Adv. v. Macleod*, 1888, 1 White 554.

³ *H.M. Adv. v. Scott*, 1892, 19 R. (J.) 63; 3 White 240.

⁴ *H.M. Adv. v. Kennedy*, 1907, 5 Adam 347.

⁵ *H.M. Adv. v. Grant*, 1862, 4 Irv. 183.

⁶ *H.M. Adv. v. Robertsons*, 1853, 1 Irv. 219.

⁷ *Moran and Others*, 1836, Bell's Notes 285; *Forrest*, 1837, 1 Swin. 404; *Pye*, 1836, 2 Swin. 187.

⁸ *Brown v. Macpherson*, 1918, J.C. 3.

⁹ P. 270, *supra*, especially as to the right to cross-examine.

same matter, is a competent witness for either side ; and, upon the same principle, where several persons are charged in the same libel with separate and unconnected offences founded upon the same *species facti*, the accused parties are competent witnesses as to facts relevant to those portions of the charge with which they are not personally connected.¹

- (2) Where one of several persons accused in the same libel pleads guilty, he may be tendered as a witness for the others.² In a recent case,³ four persons were charged with stealing lead. They pleaded guilty, and the judge postponed sentence until the day fixed for the trial for reset of a person to whom they sold the lead, and sentence was not pronounced until after they had given evidence against the accused.
- (3) If the prosecutor withdraws the charge against one of several persons accused in the same libel, the evidence of that one may be received for the others still charged.⁴
- (4) Where several persons are accused in the same libel, and the trials are separated by permission of the Court, one accused may call the other as a witness. This principle has not been extended so far as to allow an accused person to call for the defence a *socius criminis* charged with the same crime at the same Court, but on a separate libel.⁵

7. Rules as to Witnesses.—Some miscellaneous rules as to witnesses may conveniently be considered at this stage.

Proof by One Witness.—A question frequently arises as to proof by one witness. The general rule is that the testimony of one witness, however credible, is not full proof of any ground of action or defence.⁶ But this rule requires to be considered along with the following qualifications :—

- (a) Numerous Acts of Parliament provide that a person accused of contravening their provisions may be convicted on the oath of one credible witness. Where that is so, the evidence of one witness suffices, however many are available.⁷ The provision is not restricted to those cases in which there is

¹ *Bell, etc.*, 1842, 1 Broun 49 ; *Todd v. Priestly*, 1905, 7 F. (J.) 94 ; 4 Adam 605.

² *Brown, etc.*, 1856, 2 Irv. 577 ; *Wilson, etc.*, 1860, 3 Irv. 623 ; *Thomson*, 1892, 3 White 321.

³ *Brown v. Macpherson*, 1918, J.C. 3.

⁴ *Henderson, etc.*, 1850, J. Shaw 394.

⁵ *Mitchell, etc.*, 1887, 1 White 321.

⁶ Dickson on Evidence, § 1807 ; *Lockwood v. Walker*, 1910, S.C. (J.) 3 ; 6 Adam 124 ; *Harrison v. Mackenzie*, 1923, J.C. 61 ; *Townsend v. Strathern*, 1923, J.C. 66.

⁷ *Anderson v. Macdonald*, 1910, S.C. (J.) 65 ; 6 Adam 229 ; *Manson v. Macleod*, 1918, J.C. 60.

penuria testium.¹ Where a statute gives power to the Justices to convict on the testimony of one witness, the same power is impliedly conferred on the Sheriff if the complaint is brought before him.²

- (b) The oath of one credible witness, corroborated by facts and circumstances sufficient to supply the want of a second witness, is full proof.³ Amongst such corroborative facts and circumstances may be suggested the conduct of the accused person, the real evidence afforded by documents and productions, and the circumstantial evidence of a number of details proved by the oaths of separate individuals.
- (c) Any single fact in a case can be fully proved by the oath of one credible witness.⁴ Where the proof of a ground of action or defence is built up by a series of circumstantial links, it is not necessary to establish each of them by two witnesses.⁵ One person, who can depone to each fact, will prove it in the absence of rebutting evidence.

Witness's Name must be on the List of Witnesses.—This rule applies to Solemn Procedure only, and must be strictly adhered to. It does not apply to the case of the accused giving evidence on his own behalf.⁶

Illustration.—In a Sheriff and jury trial the Sheriff, after the close of the evidence on both sides, called and examined a witness whose name was not included in the list of witnesses either for the prosecution or the defence. No objection was at the time stated on behalf of the accused to this examination. Conviction suspended. Lord Young said: "But of all fixed rules in our criminal practice there is none better fixed than the rule that no witness shall be examined against the prisoner whose name is not on the list of witnesses served upon him with the Indictment. If I had been asked to give an instance of a rule well fixed and of absolute application, I could not have given one which possessed these characteristics more strongly. It stands on statute, and has been followed in practice without a single departure recorded anywhere, so far as I know, down to the present day; and we know, or at least we have heard, of cases in which the rule has been thought to operate unfortunately, evidence having transpired against the prisoner quite conclusive after the case was in the hands of the jury, but of which the prosecutor could not avail himself in any way."⁷

¹ *Jopp v. Pirie*, 1869, 1 Coup. 240.

² *Lawrence v. Ames*, 1921, J.C. 87.

³ *Hume* ii. 383; *Dickson*, §. 1808; *Dingwall*, 1888, 2 White 27; *Lees v. Macdonald*, 1893, 20 R. (J.) 55; 3 White 468.

⁴ *Lees v. Macdonald*, *supra*.

⁵ *Scott v. Jameson*, 1914, S.C. (J.) 187; 7 Adam 529.

⁶ *P.* 268, *supra*.

⁷ *H.M. Adv. v. Wynn*, 1883, 5 Coup. 370.

By the Criminal Procedure Act, 1921, however, it has been made competent for the prosecutor, but only with the leave of the Court, to examine a witness not included in the lists lodged by him, provided that written notice containing the proposed witness's name and address has been given to the accused not less than two clear days before the trial.

Prosecutor when a Competent Witness.—The prosecutor conducting a case may not be examined as a witness,¹ but if he is not actually conducting the case he is a competent witness.²

Expert Witnesses.—In many cases expert witnesses, as, for example, medical men, have to be examined as to their professional opinion on the facts. As it is essential that they should know what are the facts of the case, they ought in general to be permitted to remain in Court while the ordinary witnesses are being examined, but they should be excluded during the examination of other expert witnesses.³ On an objection by the accused person, the Court may refuse to sanction the presence of medical witnesses to hear the general evidence.⁴

Weak-minded or Insane Witnesses.—A troublesome question sometimes arises in consequence of a witness being objected to as weak-minded or insane. Where this is done, the party adducing him may examine medical witnesses to prove his capacity to understand and to give evidence. The opposite party may examine medical witnesses to prove the reverse. If there is an equal division of opinion, the witness is rejected.⁵

Illustration.—In a prosecution for culpable homicide the Crown tendered as a witness a patient in a lunatic asylum—an epileptic. Counsel for the defence objected to his evidence being received until his reliability as a witness had been set up by the Crown. The Advocate-Depute then proposed to call a medical witness for this purpose, founding on the case of *M'Kenzie*,⁶ in which it was held that in such circumstances a witness not in the prosecutor's list could be called to speak to the state of mind of a witness on the list. Counsel for defence did not object, provided he was allowed to lead counter-evidence on the same point. The Court (Lord Low) permitted the evidence both for the Crown and for the defence to be led, and afterwards permitted the witness tendered by the Crown

¹ *Graham v. M' Lennan*, 1911, S.C. (J.) 16; 6 Adam 315.

² *Mackintosh v. Wooster*, 1919, J.C. 15.

³ *H.M. Adv. v. Laurie*, 1889, 2 White 326.

⁴ *H.M. Adv. v. Dingwall*, 1867, 5 Irv. 466.

⁵ *H.M. Adv. v. Black*, 1887, 1 White 365; *H.M. Adv. v. Stott*, 1894, 1 Adam 386.

⁶ 1869, 1 Coup. 244.

to be examined, but in charging the jury advised them that they could not safely proceed upon his evidence except in so far as it was corroborated by other witnesses.¹ It has been questioned whether a witness is disqualified by the fact that he has had a fit of mania subsequently to the event as to which he is called to speak.²

Evidence of Young Children.—It frequently happens that the evidence of a young child is essential. The evidence of a child as young as three and a half years has been admitted. In such a case, the proper course appears to be to lay a foundation by adducing evidence of the account of the occurrence given by the child to its mother, or some other person, shortly after the event. The child is then examined.³ The question whether an oath should be administered to a young witness is a question within the discretion of the judge.⁴

Reference to a Witness's Precognition.—It is competent to ask a witness whether upon some specified occasion he made a statement different to the one made in the witness-box, and it is also competent to lead evidence to show that the witness did in fact make a different statement.⁵ But if the prior statement were made in precognition, it is questionable to what extent this right may be pressed. The witness is entitled to have his precognition destroyed before he gives evidence at the trial.⁶

Illustration.—In a prosecution for concealment of pregnancy, held competent to cross-examine a witness for the defence as to whether he had not made a different statement on precognition when examined by the Crown. Lord Ardmillan said: "If the question had been asked the witness in his examination in chief, the older rule would have been against its competency. But in the present state of the law I do not think that rule quite inflexible even in examination in chief. Ground for exception must, however, be explained to the Court. But cross-examination is different. The party cross-examining is entitled to test the credit of the witness of which the jury will judge."⁷

Insulting or Annoying Questions.—It is an occasional, and very bad, practice for the agent of the accused to put questions to the principal witness for the prosecution at haphazard, for the sake of insulting or annoying them. The Court can always check this

¹ *H.M. Adv. v. Stott, supra.*

² *H.M. Adv. v. M'Kenzie*, 1869, 1 Coup. 244.

³ *Stewart*, 1855, 1 Irv. 166; *H.M. Adv. v. Millar*, 1870, 1 Coup. 430; *M'Lennan v. H.M. Adv.*, 1928, S.N. 54.

⁴ *Anderson v. M'Farlane*, 1899, 1 F. (J.) 36; 2 Adam 644.

⁵ Evidence (Scotland) Act, 1852, § 3.

⁶ Dickson, § 1750.

⁷ *H.M. Adv. v. Robertson*, 1873, 2 Coup. 495.

practice by refusing to allow such questions. Where the judge suspects the intention to insult or annoy, he ought to ask the agent whether he is putting the question *bona fide* with the object of following it up by competent evidence. If the agent is merely putting the question for the sake of annoyance, he will have to admit that he has no such purpose. The judge, if he is then satisfied that the question is being put with an improper motive, will refuse to allow it, noting in the record the ground of his refusal.¹

Attacks on Character of Witnesses.—As already explained, notice is necessary before the accused is entitled to attack the character of a witness. It appears that such attacks must be of a general character. While it is competent to prove that the injured party, for example in an assault case, was of a quarrelsome disposition,² it is not permissible to prove specific acts.³ So, too, in cases of rape it is competent to show that the injured woman was of loose character,⁴ but it is doubtful whether specific acts of immorality may be proved with men other than the accused.⁵ In one case evidence was allowed of an act of immorality on the same day as, and subsequent to, the offence charged.⁶

Illustration.—In an Indictment for attempt to ravish, the panel gave notice of intention to impugn the chastity of the woman alleged to have been assaulted, and also gave particulars of specific occasions, a considerable period prior to the alleged assault, on which it was alleged the woman had improper intercourse with other men. The Sheriff-Substitute sustained an objection to the competency of evidence being led to prove these specific acts. In a suspension, the Court held that the Sheriff was right. The Lord Justice-Clerk said: “Accordingly, it does not seem to me that the relaxation of the ordinary rules of evidence in such cases should be carried any further than it has been in former cases; and that, while it is competent to prove a general bad reputation at the time of the offence, or to prove that the woman said to have been attacked had yielded her person recently to the same man, it is not competent to prove individual acts of unchastity with other men.”⁷

Stage at which Witness may be Examined.—It has to be observed that, if the accused person wishes to examine on his own behalf one of the witnesses for the prosecution, he must do so when the witness is first called. The witness cannot be recalled by either

¹ *Falconer v. Brown*, 1893, 21 R. (J.) 1; 1 Adam 96.

² *Irving*, 1838, 2 Swin. 109.

³ *Fletcher*, 1846, 3 Ark. 176.

⁴ *H.M. Adv. v. Reid*, 1863, 4 Irv. 124; *H.M. Adv. v. Forsyth*, 1866, 5 Irv. 249.

⁵ *H.M. Adv. v. Allan*, 1842, 1 Broun 500; *H.M. Adv. v. Blair*, 1844, 2 Broun 167.

⁶ *Leitch*, 1838, Bell's Notes 84.

⁷ *H.M. Adv. v. Dickie*, 1897, 2 Adam 331.

side, except by permission of the Court, to rectify an accidental omission.¹ The Court, however, can recall and examine a witness *ex proprio motu*.² Witnesses must be called to give their evidence at the proper stage of the case, and neither the prosecutor nor the defence may adduce evidence after their case is closed.³ Where evidence might be adduced according to § 20 of the Criminal Law Amendment Act, 1885, "at every stage" it was held that these words meant at every stage at which the production of evidence is competent.⁴

Presence in Court.—Witnesses other than medical or expert witnesses should not be present in Court before their own turn to give evidence arrives.⁵ If a witness has been present in Court, his evidence does not thereby become incompetent; it may, however, be diminished in value.⁶ Communication between witnesses is to be deprecated, but will not usually vitiate a conviction.⁷

Illustration.—In a suspension it was alleged that A., a witness for the prosecution, had communicated to B., another witness for the prosecution, prior to the examination of B., questions put to him (A.) in cross-examination, and the answers given thereto, and that similar communications had been made by B. to C., another witness for the prosecution, prior to his examination; that this amounted to tutoring of the witnesses; and maintained that a conviction obtained on such evidence should not be sustained. Suspension refused. Lord Justice-Clerk Moncreiff said: "At the same time, while as I have said it would have required much more precise allegation to induce us to entertain this suspension, I must say that the holding of such communication in the course of the trial is far from laudable, and that it ought not to be permitted."⁷

8. Proof of Qualifying Terms.—There are some expressions of common use in statutory charges which cause difficulty in regard to the evidence by which they are to be established. For example, if it is required that the accused person shall have acted "wilfully," the prosecutor is not entitled to a conviction unless he can satisfy the Court by competent evidence that the accused acted with the purpose and intention of doing the act prohibited.⁸

Again, where it is necessary to prove that the accused person is a dealer in certain prohibited articles, or traffics illicitly or illegally,

¹ *H.M. Adv. v. Wilkie*, 1886, 1 White 242.

² *Collison v. Mitchell*, 1897, 24 R. (J.) 52; 2 Adam 277.

³ *Docherty v. M'Lennan*, 1912, S.C. (J.) 102; 6 Adam 700.

⁴ *Clark and Bendall v. Stuart*, 1886, 13 R. (J.) 86; 1 White 191.

⁵ *Docherty v. M'Lennan*, *supra*.

⁶ Macdonald 458.

⁷ *H.M. Adv. v. Campbell*, 1884, 5 Coup. 468.

⁸ *Kinnison*, 1870, 1 Coup. 457.

it is not necessary to prove a series of transactions. Those facts are established by evidence of acts of traffic or dealing, and proof of a single act may lead to the legitimate conclusion that the accused person is an illicit dealer or trafficker.¹

Lastly, when a statutory offence consists in the use of an illegal thing, it is necessary to prove that the illegal thing was actually used, or intended to be used, by the accused person. It does not warrant a conviction that the prosecutor has proved that the illegal article was found in the possession, or upon the premises, of the accused, and that the latter has failed to prove that it was not used.²

9. Hearsay.—No more frequent subject of dispute arises in the course of criminal trials than the question whether certain evidence is to be regarded as hearsay, and, if so, whether it is to be rejected. The general rule on the subject is perfectly clear, hearsay evidence is not to be received. It is not primary evidence. This rule, however, has to be qualified in several cases.

Where the question at issue as regards a particular statement is not whether it was true, but whether it was made, evidence of it is admissible.³

Evidence will be admitted of statements which form part of the *res gestæ*, that is to say, things said which form part of what occurred at the time of the crime or immediately after it, and are either interwoven or intimately connected with the acts done, although not necessarily contemporaneous with them. The person who said these things, if alive, and not the accused, must be called as a witness, or accounted for.⁴

Evidence is admissible of statements made by the person wronged or injured by the crime, if these were made not more than a few hours after the crime, while his feeling on the subject was fresh.⁵ A wider latitude has to be allowed in cases of rape.⁶

It has already been pointed out that the statement of a child witness, made *de recenti* after the crime, will be received for the purpose of checking the evidence he gives at the trial.

It follows from what was said regarding hearsay not being the best evidence, that it is admissible when it attains that character. If a deceased person, who would have been a competent witness, has made a statement which would have been competent evidence, that statement may be proved. The death must be proved in the first instance. It is thought that the same principle would be applied to the case of a person who, since he made the statement, has become hopelessly insane.⁷ Dying depositions have already

¹ *Beattie*, 1866, 5 M. 191.

² *Hood v. Malcolm*, 1887, 15 R. (J.) 4.

³ *Dickson on Evidence*, § 247; *Coles v. Homer & Tulloh*, 1895, 22 R. 716.

⁴ *Harvey*, 1835; *Bell's Notes* 292.

⁵ *Macdonald* 479.

⁶ *Alison* ii. 514.

⁷ *Dickson on Evidence*, § 268.

been considered.¹ Serious illness or absence of a witness from the country will not admit proof of his statement. In such cases the only remedy is to delay the trial until the person can attend as a witness. Evidence on commission is incompetent.²

In the case in which this was decided, the Lord Justice-Clerk said: "The petition now before us asks the Court to grant a commission to examine witnesses abroad with a view to their depositions being read to the jury at the trial. That, it appears to me, would be in direct breach of statute, and contrary to the practice since the establishment of the Court of Justiciary; and, accordingly, I am of opinion that the prayer must be refused. I only desire to add this, that it is a different question whether, in such a case as this, the difficulties of the defence in bringing witnesses from a great distance may not be a legitimate matter for consideration of the jury in making up their minds upon the case."

10. Evidence of the Accused's Character.—The rules governing admission of evidence of the accused's character may be briefly summed up as follows:—

In Mitigation of Punishment.—After conviction, evidence of the accused's good character may be led in mitigation of the sentence to be pronounced.

As affecting his Guilt or Innocence of the Crime charged.—Previous good character can never in the ordinary case excuse the commission of a crime. But in doubtful cases or in cases where criminal intent is to be inferred from a series of acts of equivocal import, evidence of general good character may be of great value.

Prosecutor not entitled to lead Evidence of Character.—The general rule is that the prosecution may not lead evidence of the prior bad character of an accused person. This rule suffers exception in certain crimes where the accused's character is definitely related to the crime with which he is charged. A good example of this exception is assault, where the prosecutor may prove that the accused was of a quarrelsome disposition, or that he has already committed acts of aggression against his victim. A further exception is allowed where the accused seeks in cross-examination to set up his own character.

Special Provisions with regard to Summary Procedure

1. Contempt of Court.—If any witness wilfully fails to attend after being duly cited, or unlawfully refuses to be sworn, or after the oath has been administered to him refuses to answer any question

¹ P. 77, *supra*.

² *H.M. Adv. v. Hunter*, 1905, 7 F. (J.) 73; 4 Adam 523.

which the Court may allow, or to produce documents in his possession when required by the Court, or prevaricates in his evidence, he is deemed guilty of contempt of Court, and is liable to be summarily punished forthwith for such contempt by a penalty not exceeding £3, or by imprisonment for any period not exceeding twenty days. Where such punishment is summarily imposed, the Clerk of Court minutes the act or acts constituting the contempt, and the statements forming the prevarication. The prosecutor may, if he prefers to do so, proceed by way of formal complaint for such contempt, where such summary punishment as above mentioned is not imposed.¹

The same penalty as is above mentioned is incurred by any witness who, after being duly cited by virtue of the provisions contained in § 21 of the Act, fails, without reasonable excuse, after receiving at least twenty-four hours' notice, to attend for precognition by a Procurator-Fiscal or burgh prosecutor at the time and place mentioned in the citation served on him, or who refuses when so cited to give information within his knowledge in regard to any matter relative to the commission of the offence in regard to which such precognition is taken.²

Apart from statute, every Court has power at common law to punish summarily acts in contempt of its authority³—as, for example, defiant or insulting language to the judge, a witness appearing in a state of intoxication, etc.; and there may be cases justifying the Court in taking immediate steps to vindicate its authority; but the power of dealing summarily with persons who commit contempt of Court is one which should be exercised with great caution. As a general rule, the most appropriate method of dealing with such cases is to proceed afterwards by Summary complaint—a course which permits of the particular acts which are said to amount to contempt of Court being defined. It would be a very exceptional case which would require action to be taken on account of the failure of a witness to attend for precognition, or of the refusal of a witness so attending to give information in regard to matters within his knowledge; but should any such case arise, it also should, it is thought, be dealt with by way of Summary complaint and specific charge.

Illustration.—The accused, a marble merchant in Edinburgh, was tried in the Police Court there upon a charge of assault arising largely out of some disputed questions relative to the paving of a street. The magistrate who presided at the trial appeared to have some indirect interest in the matters involved, but not of such a nature as to amount to any impropriety in his dealing with the case. On the charge being found not proven the accused remarked: "I am not disappointed. I think it was improper of you to have sat in

¹ 1908 Act, § 3.

² *Ibid.*

³ Hume ii. 138.

this case, being an interested party." On being found fault with for this remark, he at once withdrew it; but notwithstanding this the magistrate sentenced him to three days' imprisonment for contempt of Court. Sentence suspended on the ground that in the circumstances such a sentence amounted to judicial oppression. There was a difference of opinion in the Bench as to whether or not the statement amounted in the circumstances to contempt of Court, Lord Adam holding that it did, and Lord Young that it did not; but all the judges were agreed that in the circumstances the sentence was unjustifiable.¹

The Sheriff, after the examination of a witness in a civil process, sentenced him to ten days' imprisonment with hard labour for having grossly prevaricated in the evidence he had given on oath. In a suspension the Court declined to interfere, and also held that in such proceedings it was unnecessary to set out in the warrant the particular acts constituting the prevarication.²

In a prosecution under the Police Act, 1850, § 360, which gave magistrates the power to imprison for prevarication, and provided that "the sentence awarding such imprisonment shall set forth the nature of such offence," it was held, following the case of *Soutar v. Stirling*,³ that the "nature of the offence" was not sufficiently set forth by the words "having wilfully concealed the truth and having persisted in such concealment after having been duly cautioned." Lord Young in that case expressed the hope that the power conferred under the Act of dealing summarily with prevaricating witnesses would be exercised very rarely, and only in very exceptional cases.⁴

2. Administration of Oath to same Witness.—Where a witness is examined upon oath in any case in which the accused is charged with an offence under any statute, and where the same witness is examined at the same diet in subsequent cases against the same or different persons accused of offences under the same statute, it is not necessary for the judge to administer the oath to the witness in the subsequent cases, but it is sufficient that the judge reminds him in each case that he is still on oath.⁵

This procedure is convenient in such cases as prosecutions under the Education Acts, where a teacher or School Board officer has to be called in each of a number of cases.

3. Witnesses for the Defence.—Provision has been made to meet the difficulty which sometimes arises in maritime and other cases where the evidence of a witness for the defence will be lost if he is

¹ *Lawrie v. Roberts*, 1882, 9 R. (J.) 22;

³ 1888, 15 R. (J.) 62; 2 White 19.

⁴ Coup. 606.

⁴ *Blake v. Macdonald*, 1890, 17 R. (J.)

² *Macleod v. Speirs*, 1884, 11 R. (J.)

46; 2 White 477.

26; 5 Coup. 387.

⁵ *Ibid.* § 37.

not examined at once. The power is sparingly used, because it is obviously inexpedient for both sides that witnesses for the defence should be examined before evidence has been heard in support of the charge. The Court is empowered, in any case where it considers such a course expedient, to permit any witness for the defence to be examined prior to evidence for the prosecution having been led or concluded. In any such case the accused is entitled to lead additional evidence after the case for the prosecution is closed.¹

4. Proving Documents.—Any letter, minute, or other official document issuing from the office, or in the custody, of any of the departments of State or Government in the United Kingdom, the production of which in evidence is required in any proceedings under the Act, and which according to the rules and regulations applicable to such departments may be competently produced, is, when produced, received as *prima facie* evidence of the matters contained in such letter, minute, or other official document without being produced or sworn to by any witness. A copy thereof bearing to be certified by any person having authority to certify the same is held as equivalent to the original. No proof of the signature of the person certifying such copy, or of his authority to certify the same, is necessary.²

Any order by any of the departments of State or Government or any local authority, or public body, made under powers conferred by any statute, or a print or copy of such order, is, when produced in any proceedings under the Act, received in evidence of the due making, confirmation, and existence of such order, without being sworn to by any witness, and without any further or other proof. This is, however, without prejudice to any right competent to the accused to challenge any such order as being *ultra vires* of the authority making it, or on any other competent ground. Where any such order is referred to in the complaint, it is not necessary to enter it in the record as a documentary production.³

The foregoing provisions are deemed to be in addition to, and not in derogation of, any powers of proving documents conferred by statute, or existing at common law.⁴

Challenge of By-laws.—In *Eastburn v. Wood*,⁵ *Cadenhead v. Smart*,⁶ and *Macgregor v. Disselduff*,⁷ convictions obtained for contravention of by-laws were set aside in respect of the by-laws being *ultra vires*. In *Smart* and *Macdonald* the by-laws had been duly confirmed. These cases may be contrasted with *Hamilton v. Fyfe*⁸ (Closing Order under the Shop Hours Act, 1904),

¹ 1908 Act, § 32 (8).

² *Ibid.* § 38 (1).

³ *Ibid.* § 38 (2). See p. 170.

⁴ *Ibid.*

⁵ 1892, 19 R. (J.) 100; 3 White 300.

⁶ 1894, 22 R. (J.) 1; 1 Adam 474.

⁷ 1907, S.C. (J.) 21; 5 Adam 196.

⁸ 1907, S.C. (J.) 79; 5 Adam 170.

in which it was held that by the statute such an order when confirmed had the force of an Act of Parliament, and that questions as to the regularity of the procedure prior to confirmation could not be raised in a Summary trial; and also with the case of *Stewart v. Todrick*¹ (Order under the Motor Car Act, 1903). This case was decided on other grounds, but doubts were expressed by the Court as to the competency of challenging such an order in a Summary prosecution.² In *Shepherd v. Howman*³ it was held that an order, which had not been invested with the force of a statute, could be challenged.

5. Admissions.—The best proof of guilt is the judicial admission of the accused. It is therefore unnecessary for the prosecutor in *Summary* Procedure to establish a charge, or part of a charge, to which the accused person pleads guilty.⁴

In any proceedings under the 1908 Act, it is not necessary for either party to lead proof of any fact which is admitted by the opposite party, or to prove any documents the terms and application of which are not in dispute. Copies of any documents may, by agreement of the parties, be accepted as equivalent to the originals. Such admissions can only be accepted from the accused where he has legal assistance in his defence. Any such admissions may be made by lodging with the Clerk of Court a minute signed by the person making the admission, or by his counsel or law agent. The facts and documents so admitted are accepted as if they had been duly proved.⁵

While there are cases where advantage may be taken of the provision of the Act, that it is unnecessary for a prosecutor to establish a charge or part of a charge to which the accused pleads guilty—as, for example, where there are two distinct charges, to one of which a plea is tendered, or where in one charge there are distinct parts easily separable—the power conferred by § 32 requires to be exercised with caution. It not infrequently happens that an accused person, on being asked to plead to a charge, makes certain admissions and puts forward certain explanations, but it would be very dangerous to accept such admissions as in part proof of the accused's guilt. Not infrequently the explanations put forward, if correct, are inconsistent with a plea of guilty. In such a case the proper course is to inform the accused that his plea will be recorded as a plea of not guilty, and to lead evidence on the whole charge unless a distinct plea of guilty is tendered.

The provision under § 39 of the Act for admissions being accepted in lieu of evidence is also one which, while in many cases it may be

¹ 1908, S.C. (J.) 8; 5 Adam 432.

² 1918, J.C. 87.

³ See *Henderson v. Ross*, 1928, S.N.

⁴ 1908 Act, § 7.

87.

⁵ *Ibid.* § 39.

extremely useful, requires to be exercised with great care. Advantage may well be taken of the provision in statutory charges in which, at present, evidence of a more or less formal nature requires to be led on points which are not in dispute. In such cases both time and money are saved by the parties adjusting admissions on these points. Indeed, in some instances where the parties are agreed upon the facts and only desire a decision on the law, it is now possible by adjusting a minute of admissions to obviate the necessity for any oral testimony. It may also be useful, in cases both under statute and at common law in which formal documentary evidence is required, to accept copies of documents or entries in books without the necessity of calling witnesses to produce the principal documents or books. It may also sometimes enable a prosecutor to assist the defence by admitting facts which can be proved by the defence without putting an accused person to the expense of bringing witnesses to establish these facts. It is, however, the duty of the prosecutor to decline to accept or to make admissions if in his opinion the interests of the public and of the accused render it more desirable that the facts should be established in the ordinary way.

6. Exceptions, Exemptions, etc.—The accused person is entitled to prove any exception, exemption, proviso, excuse, or qualification applicable to an offence under a statute or order; but no proof in relation to such matter is required on behalf of the prosecution.¹

7. Acting in Special Capacity.—Where an offence is alleged to have been committed by the accused while acting in a special capacity, as holder of a licence, master of a vessel, occupier of a house, or the like, the fact that he possesses that qualification is held as admitted without proof, unless it is challenged by preliminary objection before his plea is recorded.²

Illustration.—A person was charged under a Summary complaint with selling liquor without a certificate, contrary to the Licensing Act, 1903, § 65 (1). No evidence was tendered on either side of the crucial fact as to whether or not the accused had a licence. It was held that it was unnecessary for the prosecutor to lead evidence to that effect in view of § 19 (3) and § 19 (5).³

In a complaint which charged a colliery company and certain persons in their official capacity with an infringement of a mining regulation, the managing director of the company was described as “agent” of the mine. No preliminary objection was taken by him to this description. At the trial, the prosecutor did not found on the absence of objection as inferring an admission of agency, and the

¹ 1908 Act, § 19 (3).

² *Ibid.* § 19 (5).

³ *M'Cluskey v. Boyd*, 1916, S.C. (J.) 31; 7 Adam 742.

parties joined issue on the question of agency and led evidence thereon. The Sheriff, having found it not proven that the managing director was agent of the mine, the prosecutor sought on appeal to invoke the provisions of § 19 (5). It was held that in the circumstances he must be taken as having waived his right to found on the statutory presumption created by the section.¹

8. Nationality of Ship.—The nationality of any ship as stated in a complaint under the Merchant Shipping Acts is, in the absence of evidence to the contrary, presumed without proof, and it is no longer necessary to produce the official register of the ship.²

¹ *Archibald v. Plean Colliery Co.*, 1924, J.C. 77.

² *Ibid.* § 19 (6).

CHAPTER IV

INSANITY IN RELATION TO CRIMINAL PROCEDURE

It is not within the scope of this work to discuss the question of the relation of Insanity to Criminal Responsibility. All that this chapter aims at is briefly to indicate the procedure which must be followed when an accused person is thought to be of unsound mind. There are five stages at which the matter may be of importance—(1) during the preliminary investigations of the Crown authorities ; (2) where a plea of insanity is put forward in bar of trial ; (3) where insanity is put forward as a special defence at the trial itself ; (4) where insanity is put forward in palliation of crime charged, as reducing it from a higher category to a lower ; and (5) where insanity is urged as a ground for mitigation of sentence.

The other topic to which attention is directed is the Mental Deficiency and Lunacy (Scotland) Act, 1913.

1. Preliminary Investigation by Crown Authorities.—There are many degrees of unsoundness of mind, and the procedure necessarily differs.

When the Procurator-Fiscal is informed, or has reason to believe, that a person in custody is of unsound mind, his first duty is to instruct a qualified medical man or men to make an examination as to the mental condition of the prisoner. The subsequent procedure will be guided to a considerable extent by the report which he receives.

The case of a prisoner who is found to be of unsound mind usually falls into one or other of the following three categories :—

- (1) He may be charged with a *grave crime*, such as murder, rape, fire-raising, robbery, or serious assault, and may be certified to be insane ;
- (2) He may be charged with a *minor crime*, but may be certified to be of unsound mind and in a state threatening danger to the lieges, or in a state offensive, or threatening to be offensive, to public decency ; or
- (3) He may be charged with a *minor offence*, but certified to be simply of unsound mind, neither dangerous nor offensive to decency.

Grave Crimes.—In the first case, where the charge is a grave crime, the procedure must be by Petition, judicial examination, and committal, as already explained. In such a case it is proper that intimation of the prisoner's mental condition should be given to the governor of the prison to which he is committed, in order that measures may be taken for his safe custody. The case is then reported as speedily as possible for the instructions of Crown Counsel.

In some cases the prisoner is ultimately remitted for jury trial, with the object of his being detained during His Majesty's pleasure as a criminal lunatic. In other cases, Crown Counsel instruct that he be dealt with as a dangerous lunatic under § 15 of the Lunacy (Scotland) Act, 1862. The procedure is then the same as will be afterwards explained. With the object of facilitating the decision of Crown Counsel, it is desirable that the medical men who examine the accused person should state in their report whether his insanity is of a type which is suitable for treatment in an ordinary lunatic asylum, or whether it calls for detention in a criminal lunatic asylum.

Minor Crimes.—In the second case, where the charge is a minor one, but the accused is certified to be a dangerous lunatic, the Procurator-Fiscal takes proceedings under § 15 of the Lunacy (Scotland) Act, 1862, without making any criminal charge.

The procedure is very fully illustrated by the forms which we furnish in the Appendix. The Petition to the Sheriff craves warrant to commit the alleged lunatic to an asylum, there to be detained in safe custody till further orders of Court. In the same warrant a diet is appointed for taking evidence as to the mental condition of the lunatic.

At the time of presenting this Petition, the Procurator-Fiscal gives notice to the Inspector of Poor of the parish in which the lunatic was apprehended or found. The Inspector may, if he pleases, attend and propose a less expensive arrangement for the safe custody of the lunatic. This usually consists of a committal to a lunatic asylum on the application of the Inspector under § 14 of the statute. In that case the Procurator-Fiscal moves the Sheriff to make it a condition of granting the application that the Inspector shall undertake, on behalf of his Parish Council, that the lunatic will not be discharged from confinement by them, under § 9 of the Lunacy (Scotland) Act, 1866, without ten days' previous notice in writing given to the Procurator-Fiscal, or shall grant such other undertaking as the Procurator-Fiscal may deem necessary, or as may be approved of by the Sheriff.

These arrangements are usually made as a matter of course, but there is sometimes opposition. In that event the Procurator-Fiscal causes a full copy of the Petition, medical certificate, and warrant to be handed to the Inspector of Poor, who puts an acknowledgment

of receipt upon the principal Petition. He also procures a certified copy of the same, and transmits it along with the lunatic to the asylum in which he is to be temporarily detained. He then advertises the date fixed for the inquiry and cites the necessary witnesses. Prior to the diet he procures a warrant to bring the lunatic from the asylum to the Court, unless a medical certificate is produced that this is inexpedient. Evidence is led in the usual way, and the Sheriff pronounces such order as is necessary. The expense of the proceedings may be considerable, and to save this expense, the Inspector of Poor almost invariably intervenes.

In the third category above mentioned, where the charge is a minor one and the accused is neither dangerous nor offensive to decency, the usual practice is to send word to the Inspector of Poor of the parish in which the prisoner is detained in custody, and to ask him to deal with the lunatic as a person of unsound mind found within his parish. The Inspector generally accepts charge of the prisoner; but, if he does not do so, there does not seem to be any alternative but to discharge him from custody. He cannot be put on trial, and he cannot be dealt with under § 15 of the Lunacy (Scotland) Act, 1862.

2, Insanity in Bar of Trial.—Insanity at the time of trial, if it be of such a character as to prevent the accused from being able rationally to plead or to instruct his defence, is a bar to trial.¹ In the most authoritative case² on the subject, Lord Justice-General Dunedin defined the class of insanity which is effectual to bar trial as “Insanity which prevents a man from doing what a truly sane man would do and is entitled to do—maintain in sober sanity his plea of innocence, and instruct those who defend him as a truly sane man would do.”

Illustration.—A father was charged with the murder of two of his children, one aged two and the other ten months. It was pleaded on his behalf that he was presently insane and unable to instruct counsel for his defence, and further, that at the time of the alleged crime he was insane and not responsible for his actions. Evidence was led showing that while the panel at the date of the alleged crime and also at the date of the diet was in ordinary matters intelligent and sane, he was obsessed with the idea that the only way out of financial difficulties into which he had fallen was to kill two of his children and thereby relieve his wife of the burden of their support. He fully realised the penalty which must follow. The plea in bar of trial was sustained, Lord Constable holding (1) that a man may appreciate the nature and quality of his deed as an illegal act, and may yet be insane in respect that he fails to recognise that

¹ Hume ii. 143; Alison i. 660; Bell's

² *H.M. Adv. v. Brown*, 1907, S.C. (J.) 67; 5 Adam 312.

the act is morally wrong ; (2) that it is sufficient to justify a finding that a panel is incapable of instructing his defence if he is insane in regard to the particular subject-matter of the charge which is made against him, however sane he may be to give instructions with regard to ordinary matters outside this particular obsession.¹

If the accused be insane at the time of trial, it is immaterial what his frame of mind was when the crime was committed. The matter is regulated by the common law and by the Lunacy (Scotland) Act, 1857, §§ 87 and 88.²

By whom the Plea may be taken.—The plea is generally taken by the defence, but it may equally well be taken by the prosecutor,³ or by the Court *ex proprio motu*.⁴ There is no limitation on the sources of information on which the Crown or the Court may rely in deciding to put forward this plea. In the case of *H.M. Advocate v. Brown*,⁵ already referred to, the Court allowed the Crown to take the plea despite the opposition of the accused and of his Counsel, who stated to the Court that he had received instructions personally, and that these instructions were just such, so far as he could judge, as a sane man would give.

Procedure.—The plea must be taken at the first diet.⁵ The usual practice is for proof of insanity to be taken before the judge without empanelling a jury. But it is quite competent for a preliminary investigation of this type to be dispensed with and for the trial to go on before the jury, it being left to the jury to say whether or not the accused is able to plead or to instruct his defence. This was the course followed in Brown's case, the Court deeming it inexpedient in the particular circumstances of that case to order a preliminary inquiry in view of the opposition of the accused.

It is competent for the jury at any time during the trial to arrive at the conclusion that the accused is then insane.⁶ A finding to that effect is made, and puts an end to the proceedings.

Where a plea was tendered and it appeared that the accused was a dangerous lunatic, but was at the time of the trial enjoying a lucid interval, the plea was sustained.⁷

Where one of a number of persons became insane during the

¹ *H.M. Adv. v. Sharp* 1927, J.C. 66, following *H.M. Adv. v. Miller*, 1874, 3 Coup. 16, and *H.M. Adv. v. Robertson*, 1891, 3 White 6.

² 20 & 21 Vict. c. 71.

³ *H.M. Adv. v. Brown*, 1907, S.C. (J.) 67; 5 Adam 312.

⁴ *Alison* i. 659; *H.M. Adv. v. Warrand*, 1825, Shaw Just. 130; *H.M.*

Adv. v. Paterson, 1842, 1 Broun 200; *H.M. Adv. v. Robertson*, 1891, 3 White 6.

⁵ 1887 Act, §§ 28 and 29, and see *H.M. Adv. v. Brown*, *supra*.

⁶ *H.M. Adv. v. Milne*, 1863, 4 Irv. 301.

⁷ *H.M. Adv. v. Flynn*, 1910, 6 Adam 251; 1 S.L.T. 356.

trial, evidence of insanity was led, and the presiding judge directed the jury to return a verdict of not guilty in his case.¹

Where the accused is found insane, the Court shall order such person to be kept in strict custody until His Majesty's pleasure shall be known.²

3. Insanity as a Defence at the Trial.—That the accused was insane at the time of the commission of the crime and therefore not criminally responsible for what he did is a competent defence. If the jury accept the defence, they acquit on the ground of insanity.³

As the defence of insanity is a special defence, it must be tendered at the first diet unless cause be shown for its not having been so lodged. In no event may it be tendered later than two clear days before the trial.⁴

What amounts to insanity of such a degree as to exempt from criminal liability may be studied in the undernoted cases.⁵

Abnormality of mind falling short of insanity may be pleadable as a defence. The driver of a motor car was charged with causing the death of a pedestrian by his reckless driving. A special defence was put forward "that by the incidence of temporary mental dissociation due to toxic exhaustive factors, he was unaware of the presence of the deceased on the highway and of his injuries and death, and was incapable of appreciating his immediately previous and subsequent actions." Lord Murray directed the jury that, if the accused was otherwise in a condition which justified his driving a car, and if, through no fault of his own and for some cause outwith his control and which he was not bound to foresee, he became either gradually or suddenly not master of his action through some mental defect, and was in that state at the time of the accident, they were entitled to return a verdict of not guilty.⁶

4. Insanity as a Palliation of the Crime charged.—There may be such mental weakness or abnormality as not to amount to complete alienation of reason so as to bar trial or form a complete defence against the crime charged. In such a case the crime charged may be reduced to one of a lesser category, as, for example, murder may be reduced to culpable homicide.⁷

Illustration.—In a trial for murder where a special defence of insanity was lodged, the presiding judge charged the jury that there

¹ *H.M. Adv. v. Walsh*, 1922, J.C. 82.

² Lunacy Act, *supra*, § 87.

³ Macdonald 510.

⁴ 1887 Act, § 36.

⁵ *H.M. Adv. v. Fraser*, 1892, 3 White 328; *H.M. Adv. v. Wood*, 1888, 2 White 59; *H.M. Adv. v. Macklen*, 1876, 3 Coup. 257; *H.M. Adv. v. Barr*, 1876,

3 Coup. 261; *H.M. Adv. v. M'Clinton*, 1902, 4 Adam 1; *H.M. Adv. v. Sharp*, 1927, J.C. 66.

⁶ *H.M. Adv. v. Ritchie*, 1926, J.C. 45.

⁷ *H.M. Adv. v. Dingwall*, 1867, 5 Irv. 466; *H.M. Adv. v. Graham*, 1906, 5 Adam 212.

was sometimes a state of mind bordering on insanity, but not amounting to it which would entitle the jury, if they saw fit, to return a verdict of culpable homicide against the panel instead of one of murder, though if the crime was proved it would not entitle them to return a verdict of acquittal.¹ The law has recently been laid down to the same effect by Lord Justice-Clerk Alness.²

Where evidence was led that the panel had suffered from sunstroke and epilepsy, the presiding judge charged the jury: "In cases of murder . . . the law . . . is now settled that the jury are entitled, if the evidence warrants it, to deal with a prisoner as in a third class, those who, though responsible, are not fully responsible, and who are considered as liable in penalty, but not a capital penalty."³ But it would appear that there must be some mental debility amounting to brain disease,⁴ and, accordingly, mere mental degeneracy not amounting to insanity cannot reduce the crime from murder to culpable homicide.⁵

5. Insanity in Mitigation of Sentence.—Mental abnormality, weak-mindedness or lack of balance may be urged, after conviction, as a ground for leniency of sentence. Such weakness or aberration, while not amounting to insanity, may be taken into account as modifying the character of the offence charged, and consequently as a ground for modifying the punishment.⁶

6. Mental Deficiency.—The Mental Deficiency and Lunacy (Scotland) Act, 1913,⁷ § 9, enacts that where a person is charged with any offence punishable with penal servitude or imprisonment, and the Court is of opinion that the charge is proved, the Court may, if it appears to it that the accused is a defective within the meaning of the Act, without proceeding to convict, adjourn the proceedings and report the case to the local authority concerned, or to the Procurator-Fiscal with a view to obtain a judicial order under the Act. The section goes on to enact that where it appears to the prosecutor that the accused person is a defective within the meaning of the Act, it is the prosecutor's duty to bring before the Court such evidence as may be available of his mental condition.

The scope of this section was very fully considered in the case of

¹ *H.M. Adv. v. Ferguson*, 1881, 9 R. (J.) 9; 4 Coup. 552.

² *H.M. Adv. v. Savage*, 1923, J.C. 49; see also *H.M. Adv. v. Brown*, 1882, 4 Coup. 596; *H.M. Adv. v. Gove*, 1882, 4 Coup. 598; *H.M. Adv. v. Smith*, 1893, 1 Adam 34.

³ *H.M. Adv. v. Edmonstone*, 1909, 2 S.L.T. 223.

⁴ *H.M. Adv. v. Aitken*, 1902, 4 Adam 88.

⁵ *H.M. Adv. v. Higgins*, 1914, S.C. (J.) 1; 7 Adam 229.

⁶ *H.M. Adv. v. Dingwall*, 1867, 5 Irv. 466; *H.M. Adv. v. M'Lean*, 1876, 3 Coup. 334; *H.M. Adv. v. Wilson*, 1877, 3 Coup. 429.

⁷ 3 & 4 Geo. V. c. 38.

H.M. Advocate v. Breen,¹ where two accused persons were charged on Indictment with indecent practices and attempts to ravish. At the pleading diet both the accused pleaded not guilty, "and specially that on the dates when they were alleged to have committed the crimes libelled they were and still are defectives, being feeble-minded persons within the meaning of the Mental Deficiency (Scotland) Act." Thereafter the panels were brought up for trial in the High Court before five judges, and the whole matter of the scope of the Act was discussed. The following propositions were established.

Mental deficiency cannot, under the Mental Deficiency and Lunacy Act, 1913, be pleaded in bar of trial.

Where the trial of an accused is by judge and jury and the accused pleads not guilty, it is for the jury and not for the judge before the jury is empanelled, to determine (a) whether the charge is or is not proved, and (b) if the charge is found proved, whether the accused is or is not a defective within the meaning of the Act. If the jury find the charge proved and that the accused is not a defective, the judge will interpret their verdict as one of guilty, and will pronounce sentence in the ordinary way. If the jury find the charge proved, and that the accused is a defective, the judge will not, *hoc statu*, interpret the verdict as one of guilty, but will adjourn the proceedings with a view to the obtaining of a judicial order for the detention of the accused in an institution for defectives in terms of the Act. Where such an order is obtained, proceedings at the adjourned diet will terminate without an interpretation of the verdict and without the passing of sentence; where such an order is not obtained, the judge will interpret the verdict of the jury as one of guilty and will pronounce sentence in the ordinary way.

It was also observed that § 9 does not apply to a case in which the accused pleads guilty; where a sentence of imprisonment follows on such a plea, the prisoner's remedy, if he alleges that he is a defective, is by application under § 10 to the Secretary for Scotland.

The provision in § 9 which imposes on the prosecutor the duty of leading evidence of the accused's mental deficiency, does not debar the accused from himself raising the question and leading evidence thereon, provided that he has given due notice to the prosecutor of his intention.

Where proceedings were adjourned, after a verdict of a jury that the accused was a defective, in order that the Procurator-Fiscal might obtain a judicial order for his detention in an institution, and where the Sheriff-Substitute to whom application was made refused the order in respect that there was no certified institution available for his detention, the presiding judge refused to allow the accused to be liberated, but found him guilty and sentenced him to imprisonment.²

¹ 1921, J.C. 30.

² *H.M. Adv. v. Gordon*, 1921, J.C. 67.

The cases of *Breen* and *Gordon* illustrate the operation of the Act in Solemn Procedure. The results of these two cases have been incorporated in an Act of Adjournal.¹

Special Procedure in Solemn Jurisdiction.—The procedure to be followed in cases where a defence of mental deficiency is put forward is now defined by the Act of Adjournal. Notice must be given within seven days either of the date of the warrant committing the accused, or if he be admitted to bail, of the date of his liberation on bail. The notice must be in writing, signed by or on behalf of the accused, and must specify under which of the four classes of persons deemed to be defectives under § 1 of the Act the accused is alleged to fall. The notice may be in the form provided by the Act of Adjournal. The notice is sent to the Clerk of Court, and a duplicate to the prosecutor, both by registered post. The notice must be accompanied by a list of the names and addresses of the witnesses whom the accused proposes to examine to prove that he is a mental defective. These provisions do not apply to Summary prosecutions.

Provision is also made in § 9 of the Act for the case of children, and that section must be read along with § 58 of the Children Act.

¹ Act of Adjournal, 2nd February 1921.

CHAPTER V

LIABILITY OF JUDGES, CLERKS OF COURT, AND PROSECUTORS TO ACTIONS OF DAMAGES AGAINST THEM

Judges of the Supreme Court.—Judges of the Supreme Court are immune from all action at law for damages for anything done by them when sitting in their judicial capacity. Lord Justice-Clerk Macdonald stated the principle on which this immunity is based, as follows: ¹ “Such judges are the King’s judges directly bound to administer the law between his subjects, and even between his subjects and himself. To make them amenable to actions of damages for things done in their judicial capacity, to be dealt with by judges only their equals in authority and by juries, would be to make them not responsible to the King, but subject to other considerations than their duty to him in giving their decisions, and to expose them to be dealt with as servants not of him but of the public. Accordingly, the remedy in this case, if they flagrantly offend against duty, is not by proceedings in any Court, but only by addresses to the Crown from the Houses of Parliament.”

Sheriffs.—As Sheriffs are also the King’s judges, the same principle applies.²

Inferior Judges.—Any claim to immunity on the part of inferior judges cannot be based on the fact of immunity of the King’s judges. Where the judge is appointed not by the King, but by the community or some authority in the community not having the kingly prerogative, but only acting by a delegated authority for local administration, as in the cases of Justices of the Peace, the position is different.³

Their immunity is different in character, but is nevertheless extensive. They cannot be made amenable for words used, however severely they comment on the conduct of individuals, provided such words are uttered while acting in the exercise of their magisterial functions.⁴ At common law, however, such a magistrate enjoys a high privilege and will not be made liable in damages unless he acts maliciously and without probable cause; but if he acts without jurisdiction or exceeds his jurisdiction in sentencing an accused

¹ *M’Creadie v. Thomson*, 1907, S.C. 1176.

³ *M’Creadie v. Thomson*, *supra*.

⁴ *Primrose v. Waterston*, 1902, 4 F.

² *Harvey v. Dyce*, 1876, 4 R. 265.

783.

person, and that sentence has been carried out, he is liable in damages, and it would appear that in such circumstances malice may be inferred from his so acting.¹ On the other hand, it cannot be said that any slight error would warrant damages² against a judge, but acting without or in excess of jurisdiction amounts to *culpa lata*, and, from the grossness of the error, presumes a perverse will.³

Prosecutors.—The common law recognises that a public prosecutor, while discharging his public duties, occupies a position of high privilege. The Lord Advocate and his deputies enjoy an absolute privilege, but this is not shared by inferior prosecutors or Procurators-Fiscal who may incur liability if they act from malice or without probable cause.⁴ The position of the latter is therefore very much the same as that of an inferior judge. Private prosecutors may be liable in damages if they fail to obtain a conviction.⁵

Statutory Protection of Inferior Judges and Officials.—In addition to the common law protection afforded to inferior judges (other than Sheriffs)⁶ and officials, the Legislature has given additional safeguards. The position is now crystallised in § 59 of the 1908 Act, which provides that no Judge, Clerk of Court, or prosecutor in the public interest shall be liable to pay or be found liable by any Court in damages for, or in respect of, any proceeding taken, act done, or judgment decree, or sentence pronounced under this Act, unless the person suing has suffered imprisonment in consequence thereof, and any such proceeding, act, judgment, decree, or sentence has been quashed, and unless the person suing shall specifically aver and prove that such proceeding, act, judgment, decree, or sentence was taken, done, or pronounced maliciously and without probable cause; provided that no such liability shall be incurred or found where such Judge, Clerk of Court, or prosecutor shall establish that the person suing was guilty of the offence in respect whereof he had been convicted, or on account of which he had been apprehended or had otherwise suffered, and that he had undergone no greater punishment than was assigned by law to such offence; and every such action shall, unless a shorter period is fixed by the special statute under which proceedings may be taken, be commenced within two months after the proceeding, act, judgment, decree, or sentence founded on.

¹ Bell's Principles, §§ 20, 38; *M'Creadie v. Thomson*, *supra*; *Pollock v. Clark*, 1829, 8 S. 1.

² *M'Creadie v. Thomson*, *supra*; *Malone v. Walker*, 1841, 3 D. 418.

³ Esk. Inst., 1, 2, 32.

⁴ Alison, ii. 92 *seq.*; *Urquhart v. Dick*, 1865, 3 M. 932; *Beaton v. Ivory*, 1887, 14 R. 1057.

⁵ Hume ii. 128; Alison ii. 114.

⁶ 1908 Act, § 59.

The effect of the section is to impose four conditions before such an action is competent.¹ (1) The common law is specifically declared, and a pursuer must aver both malice and want of probable cause. (2) The person suing must have suffered the real injury of imprisonment. If the punishment has been a fine, it is implied that sufficient reparation may be obtained by procuring the quashing of the conviction and the repayment of the fine. (3) The proceeding complained of must have been quashed. And (4) the action of damages must be commenced within a certain time. Failure to aver malice and want of probable cause has been held fatal to the relevancy of an action against a Procurator-Fiscal.

Illustration.—A father, resident in Midlothian, was arrested and detained in prison on a charge at the instance of the Procurator-Fiscal of Lanarkshire, purporting to be brought under the Summary Jurisdiction Act, 1908, of neglecting his child contrary to the Children Act, 1908. He was tried in the Sheriff Court of the County of Lanark, where the child was living with its mother, and acquitted. He brought an action against the Procurator-Fiscal, averring (1) that the proceedings were *ultra vires* of the 1908 Act in respect that the place of the alleged offence was in Midlothian and not in Lanarkshire; and (2) that the defender had acted maliciously and without probable cause (a) in obtaining the arrest and imprisonment of the pursuer when the pursuer was ready to answer a citation; and (b) in failing to make such inquiries as would at once have disclosed the facts on which he was acquitted. The Court held that the proceedings were not *ultra vires* and that the action was excluded by § 59 in respect that there was no averment of an oblique motive or of facts and circumstances from which malice could be inferred. The questions whether the pursuer had suffered “imprisonment” and whether the proceedings had been “quashed” were mooted but not decided.²

If the defender in an action of damages invokes the protection of this section, he must have been proceeding under the Act.³ If he has acted outwith the sphere of his jurisdiction,⁴ or if he proceeds without a warrant or on a warrant from a judge who is not qualified to grant it,⁵ or if he purports to prosecute on a charge which does not set forth “any known offence either statutory or at common law, but some indifferent or ludicrous act inferring no legal consequences of any kind,”⁶ he cannot claim the statutory privilege. In fact, in such cases malice might well be presumed.⁷

¹ *Graham v. Strathern*, 1924, S.C. 699, per Lord Anderson at 724.

² *Rae v. Strathern*, 1924, S.C. 147.

³ *Graham v. Strathern*, 1924, S.C. 699.

⁴ *M'Crone v. Sawers*, 1835, 13 S. 443.

⁵ *Bell v. Black and Morrison*, 1866, 3 M. 1026.

⁶ *Ferguson v. M'Nab*, 1885, 12 R. 1083.

Graham v. Strathern, *supra*, per L.J.C. Alness at 718.

Illustration.—An action of damage was brought against a Procurator-Fiscal in which the pursuer, a bank teller, averred that the defender, knowing that he was not guilty of reset, had charged him, ostensibly under the 1908 Act, with reset of certain coins, and had obtained a warrant for his arrest. The pursuer further averred that he had been detained in custody in the bank until the coins were handed over and had then been immediately released. He averred that these proceedings were taken, not in order to prosecute him for the crime of reset, but solely to concuss him into surrendering the coins which the defender desired for the purpose of prosecuting the thief. It was held that the pursuer's averments at most instructed that the proceedings, which were *ex facie* regular and competent under the 1908 Act, had been taken maliciously by the defender; that in the circumstances the proceedings did not on that account cease to be proceedings under the Act; and that as the pursuer had not suffered imprisonment and the proceedings against him had not been quashed, the action was excluded by § 59.¹

¹ *Graham v. Strathern, supra.*

APPENDIX OF FORMS

APPENDIX I

SOLEMN PROCEDURE

1. PETITION

EDINBURGH, *12th May* 1926.

UNTO THE HONOURABLE THE SHERIFF OF THE LOTHIANS AND PEEBLES.

The PETITION of J. G. B., Procurator-Fiscal of Midlothian,
for the public interest,

HUMBLY SHEWETH,—

That from credible information which the Petitioner has received it appears, and he now charges, that A. B., Labourer, 81 High Street, Edinburgh, on 20th April 1926 in a shop in Nicolson Street, Edinburgh, occupied by John Cruikshank, Draper, did steal a shawl, a boa, and several books of blank cheques of the Bank of Scotland. And the said A. B. has been previously convicted of dishonest appropriation of property. In order therefore that the said accused may be dealt with according to Law,—

May it please your Lordship to Grant Warrant to Officers of Law—(1) to search for and apprehend the said A. B., lodge him in a police station house or other convenient place, and bring him before you for examination respecting the premises; (2) to search the person, repositories, and domicile of said accused, and the house or premises in which he may be found, and secure for the purposes of precognition and evidence all writs, evidents, and articles found tending to establish guilt or participation in the crime foresaid, and if necessary for any of the purposes foresaid, whether of apprehension or search, to open all shut and lockfast places; (3) to cite all persons likely to have knowledge of the premises in order to be precognosced thereanent, and to make production for the purposes foresaid of such writs, evidents, and articles pertinent to the case as are in their possession or under their control; and (4) after examination as aforesaid, to commit the said accused to the Prison of Edinburgh, therein to remain for further examination or till liberated in due course of law; further, to recommend to the judges of other counties and jurisdictions to grant the Warrants of Concurrence necessary for enforcing that of your Lordship within their respective territories.

According to Justice,
J. G. B.,
P.F.

2. WARRANT TO APPREHEND, ETC.

EDINBURGH, *12th May* 1926.—The Sheriff-Substitute having considered this Petition, Grants Warrant to Officers of Law to search for and apprehend

the said A. B., and if necessary to detain him in a police station house or other convenient place, and bring him for examination; and also to search and secure and to cite for precognition, all as craved; and, if necessary for execution of any of the foresaid purposes, Grants Warrant to open all shut and lockfast places; further, recommends judges of other counties and jurisdictions to grant any Warrants of Concurrence necessary for enforcing this warrant within their respective territories.

R. L.

3. ARREST BEYOND JURISDICTION

(1) FORM OF PRELIMINARY DECLARATION

I, C. D., Inspector of Police of Edinburgh, in the County of Midlothian, solemnly and sincerely declare that the name of "R. L.," to the within warrant subscribed, is of the handwriting of the Sheriff-Substitute within mentioned, and I make this solemn declaration conscientiously believing the same to be true. Dated at Edinburgh, this thirteenth day of May Nineteen hundred and twenty-six. (Signed) C. D.

(,) E. F., Justice of the Peace for the County of Midlothian.

(2) FORM OF BACKING

Whereas proof hath this day been made before me, one of His Majesty's Justices of the Peace in and for the County of , that the name of "R. L.," to the within warrant subscribed, is of the handwriting of the Sheriff-Substitute within mentioned,—I do therefore hereby authorise T. A., who bringeth to me this warrant, and all other persons to whom this warrant was originally directed, or by whom it may lawfully be executed, and also all constables and other peace officers of the said County of , to execute the same within the said last-mentioned county. Given under my hand this seventeenth day of May Nineteen hundred and twenty-six.

(Signed) A. R., J.P.

4. JUDICIAL EXAMINATION

(1) DECLARATION

At Edinburgh, the thirteenth day of May Nineteen hundred and twenty-six. In presence of R. L., Esquire, Sheriff-Substitute of the Lothians and Peebles,—

COMPEARED a prisoner, attended by E. F., Solicitor, Edinburgh, his agent, and the charge against said prisoner being read over and explained to him, and he being judicially admonished and examined thereanent:

DECLARES:—My name is A. B. I am twenty-three years of age. I am unmarried. I am a labourer, and reside at 81 High Street, Edinburgh. I have to say in answer to the charge of Theft which has been read

over to me, that I was at my mother's house, No. Sauchiehall Street, Glasgow, at the time when the theft is said to have been committed. All which I declare to be truth.

A. B.

R. L.

The foregoing Declaration, written (so far as not printed) by G. H., Sheriff Clerk Depute of Midlothian, was, on the date which it bears, freely and voluntarily emitted by the therein-designed A. B. while in his sound mind and sober senses; and on being read over was adhered to by him, and subscribed by him and, in his presence, by said Sheriff-Substitute, before these witnesses, the said G. H., and J. K., and L. M. (*design them*).

(Signed) G. H., Witness.

(„) J. K., Witness.

(„) L. M., Witness.

(2) MINUTE OF PROCEDURE WHERE PRISONER INSANE AND WARRANT OF COMMITTAL TO PRISON

At Edinburgh, the thirteenth day of May Nineteen hundred and twenty-six. In presence of R. L., Esquire, Sheriff-Substitute of the Lothians and Peebles,—

COMPEARED A. B. (*designation*), in order to be examined, attended by E. F., Solicitor, Edinburgh, his agent.

Dr G. H. (*address*), was also present, and stated that he had just had an interview with and examined the Prisoner, and that his appearance and answers indicated that he was labouring under acute mania. A certificate to this effect, and also that the said A. B. was unable to be examined at present, was produced.

In respect of the above circumstances, the Sheriff-Substitute did not proceed to take the Declaration.

R. L.

EDINBURGH, 13th May 1926.—The Sheriff-Substitute, having considered the Petition with the Medical Certificate dated _____ by G. H., M.D., Edinburgh, that the said accused is of unsound mind and is unable to be examined at present, on the motion of the Procurator-Fiscal, Grants Warrant to imprison the said accused in the Prison of Edinburgh, therein to be detained for further examination.

R. L.

5. COMMITTAL

(1) NO DECLARATION : COMMITTAL FOR FURTHER EXAMINATION

EDINBURGH, 8th June 1926.—The Sheriff-Substitute, having again considered this Petition, and the said A. B. having intimated that he does not desire to emit a Declaration, Grants Warrant to Officers of Law to incarcerate him in the Prison of Edinburgh, therein to be detained for further examination.

R. L.

(2) NO DECLARATION : COMMITTAL FOR TRIAL AND SENTENCE UNDER § 31

EDINBURGH, 8th June 1926.—The Sheriff-Substitute, having again considered the Petition and Letter in terms of section 31 of the Criminal Procedure

(Scotland) Act, 1887, by the agent of the said A. B., and the said A. B. having intimated that he does not desire to emit a Declaration, on the motion of the Procurator-Fiscal Grants Warrant to imprison the said A. B. in the Prison of Edinburgh, therein to be detained until liberated in due course of Law.

R. L.

(3) NO DECLARATION : COMMITTAL FOR TRIAL

EDINBURGH, 15th June 1926.—The Sheriff-Substitute, having again considered this Petition and relative Precognition, and the said A. B. having intimated that he does not desire to emit a Declaration, Grants Warrant to Officers of Law to incarcerate him in the Prison of Edinburgh, therein to remain until liberated in due course of Law ; [and admits the Prisoner to Bail on his finding Caution to the extent of Fifteen pounds].

R. L.

(4) DECLARATION : COMMITTAL FOR FURTHER EXAMINATION

EDINBURGH, 8th June 1926.—The Sheriff-Substitute having again considered this Petition, with the Declaration of the said A. B., Grants Warrant to Officers of Law to incarcerate him in the Prison of Edinburgh, therein to be detained for further examination.

R. L.

(5) DECLARATION : COMMITTAL FOR TRIAL AND SENTENCE UNDER § 31

EDINBURGH, 15th June 1926.—The Sheriff-Substitute, having again considered the Petition, Declaration of the said A. B., and Letter in terms of section 31 of the Criminal Procedure (Scotland) Act, 1887, granted by the agent of the said A. B., on the motion of the Procurator-Fiscal, Grants Warrant to imprison the said A. B. in the Prison of Edinburgh, therein to be detained until liberated in due course of Law.

R. L.

(6) DECLARATION : COMMITTAL FOR TRIAL

EDINBURGH, 15th June 1926.—The Sheriff-Substitute, having again considered this Petition, with the Declaration of the said A. B., and relative Precognition, Grants Warrant to Officers of Law to incarcerate him in the Prison of Edinburgh, therein to remain until liberated in due course of Law ; [and admits the Prisoner to bail on his finding Caution to the extent of Fifteen pounds].

R. L.

Note.—The finding as to bail will only be added when the amount of bail has been agreed to by both parties.

6. BAIL

(1) PETITION FOR BAIL

EDINBURGH, 20th May 1926.

UNTO THE HONOURABLE THE SHERIFF OF THE LoTHIANS AND PEEBLES

The PETITION of A. B. (*design him*),

HUMBLY SHEWETH,—

That he has been committed to the Prison of Edinburgh, therein to remain until liberated in due course of Law, upon a Petition at the

instance of J. G. B., Procurator-Fiscal of Midlothian, for the public interest, charging the Petitioner with the crime of Theft, conform to Copy Petition and Warrant of Committal produced herewith.

That the Petitioner is innocent of the said crime.

That the said crime is bailable.

May it therefore please your Lordship to liberate the Petitioner on his finding bail to the satisfaction of the Clerk of Court to such amount as your Lordship shall appoint.

According to Justice, etc.,

E. F.,

Pror. for Petitioner.

(2) ADMISSION TO BAIL

EDINBURGH, 20th May 1926.—The Sheriff-Substitute, having considered the foregoing Petition, admits the Petitioner to bail on his finding caution to appear at all Diets of Court upon any Indictment or Complaint that may be brought against him on account of the crime mentioned in the Petition, and that at any time within six months from the date of his Bail Bond, under the penalty of pounds sterling. R. L.

(3) MINUTES OF APPEAL

(a) *When Bail Refused*

EDINBURGH, 20th May 1926.—The Petitioner appeals the foregoing deliverance to the High Court of Justiciary.

E. F.,

Pror. for Petitioner.

(b) *When Amount Excessive*

EDINBURGH, 20th May 1926.—The Petitioner appeals to the High Court of Justiciary against the amount of bail fixed in the foregoing deliverance.

E. F.,

Pror. for Petitioner.

(c) *Where Procurator-Fiscal Objects*

EDINBURGH, 20th May 1926.—The Procurator-Fiscal appeals to the High Court of Justiciary against the accused being admitted to bail; or otherwise to have the amount of bail increased to such sum as the High Court of Justiciary may fix.

J. G. B.,

Procurator-Fiscal.

(4) BAIL BOND

I, M. N. (*design him*), considering that A. B. (*design him as in Declaration or Committal*) has been brought before the Sheriff of the Lothians and Peebles for judicial examination under a Petition at the instance of the Procurator-Fiscal of Midlothian relative to the crime of Theft as therein set forth, and has been admitted to bail on finding caution as after mentioned, do hereby judicially BIND and OBLIGE myself, my Heirs, Executors, and Successors, as Cautioners and Sureties, acted in the Sheriff Court Books of Midlothian, for

the said A. B. that he shall, when desired, appear at all Diets to which he may be cited for further examination on said charge; and also that he shall appear personally, and answer any and every Indictment or Complaint which may be served upon him with reference to the said charge, at any time and place to which he shall be lawfully cited within the space of six months from the date hereof, and at all Adjournments or Continuations of the Diets of Court, aye and until the said Charge shall be finally-disposed of, or the said period of six months has fully expired, and that under the penalty of pounds; and I, the said A. B., hereby appoint the Sheriff Clerk's Office, Edinburgh [*or other place, such as his agent's office*], as a domicile at which I may be lawfully cited; declaring that any and every citation left for me there shall be as effectual as if delivered to me personally: And we consent to the registration hereof in the said Sheriff Court Books, or others competent for preservation and execution. In Witness Whereof, etc.

(5) CERTIFICATE BY JUSTICE OF PEACE

I, P. Q., one of His Majesty's Justices of the Peace for the County of the City of Edinburgh, hereby certify the within-designed Cautioner to be habit and repute responsible for the sum of pounds contained in the within Bond.

Given under my hand at Edinburgh this
Nineteen hundred and twenty-six.

day of May
P. Q., J.P.

Note.—This certificate may be dispensed with if the amount of bail is consigned with the Bond, or if the Clerk of Court is satisfied of the sufficiency of the Cautioner.

7. PRISONER OF UNSOUND MIND

(1) MEDICAL CERTIFICATE: PRISONER DANGEROUS

CUPAR-FIFE, 22nd June 1926.—I hereby certify on soul and conscience that I have this day, within the County Buildings here, seen and examined A. B. , presently in the custody of the Police on a charge of , and I am of opinion that he is of unsound mind, and in a state threatening danger to the lieges [*or, in a state offensive, or threatening to be offensive, to public decency*].

(2) MEDICAL CERTIFICATE: PRISONER NOT DANGEROUS

CUPAR-FIFE, 22nd June 1926.—I hereby certify on soul and conscience that I have this day, within the County Buildings here, seen and examined A. B. , presently in the custody of the Police on a charge of , and I am of opinion that he is of unsound mind, and not responsible for his actions, but that he is neither in a state threatening danger to the lieges nor in a state offensive, or threatening to be offensive, to public decency.

(3) PETITION UNDER LUNACY (SCOTLAND) ACT, 1862, § 15

CUPAR, 22nd June 1926.

UNTO THE HONOURABLE THE SHERIFF OF FIFE AND KINROSS
The PETITION of B. G., Procurator-Fiscal of Court,

HUMBLY SHEWETH,—

That the Petitioner has received credible information that A. B. is a person of unsound mind, and in a state threatening danger to the lieges, as appears from the subjoined Certificate under the hand of C. D., Doctor of Medicine, residing at Cupar.

That by the 15th section of the Lunacy (Scotland) Act, 1862, provision is made for the apprehension of such persons and their being dealt with in manner therein mentioned.

That the Parish within which the said A. B. was apprehended [or found] is the Parish of _____, in the County of Fife.

May it therefore please your Lordship to Grant Warrant to Officers of Law to apprehend the said A. B. and commit him to the Fife and Kinross District Lunatic Asylum at Springfield, Cupar, or some other place of safe custody, in terms of said section of said Act, and to authorise the other proceedings mentioned therein.

According to Justice,

B. G.,

Procurator-Fiscal.

(4) MEDICAL CERTIFICATE

CUPAR, 22nd June 1926.—I hereby certify on soul and conscience that I have this day examined A. B., mentioned in the foregoing Petition, and am of opinion that he is of unsound mind and in a state threatening danger to the lieges.

C. D.

(5) FIRST DELIVERANCE

CUPAR, 22nd June 1926.—The Sheriff-Substitute having considered the foregoing Petition and Certificate, Grants Warrant to Officers of Law to apprehend the said A. B. and commit him to the Fife and Kinross District Lunatic Asylum at Springfield, Cupar, therein to be detained in safe custody till further orders of Court, and directs notice to be given in the *Fife Herald and Journal* newspaper, published at Cupar, that it is intended to inquire into the condition of the said A. B. within the ordinary Sheriff Court room, Cupar, at eleven o'clock forenoon of Thursday, the first day of July 1926; and also directs notice of said application to be given to the Inspector of Poor of the said Parish of _____, all in terms of the statute; with certification that if the Inspector of Poor of said Parish does not within twenty-four hours undertake to the satisfaction of the Sheriff to make due arrangements for the safe custody of the said A. B., the Sheriff will proceed to take evidence of the condition of said alleged lunatic, time and place last mentioned, and for that purpose Grants Warrant to Officers of Law to cite witnesses for both parties, and to bring the said alleged lunatic into Court to be present at the inquiry.

S. D.

(6) PROCEDURE WHERE INSPECTOR INTERVENES

(a) *Minute by Inspector of Poor*

CUPAR, 22nd June 1926.—As Inspector of Poor of, and on behalf of, and as authorised by the Parish Council, I hereby not only acknowledge having received intimation of the foregoing Petition, Certificate, and Warrant, but undertake to make due arrangements for the safe custody of the said A. B., all in terms of and to the effect contained in section 15 of the Lunacy (Scotland) Act, 1862, and also undertake that the said A. B. shall not be discharged from confinement under the 9th section of the Lunacy (Scotland) Act, 1866, without ten days' previous notice in writing being given to the Procurator-Fiscal at Cupar.

E. F.,
Inspector of Poor.

(b) *Interlocutor by Sheriff*

CUPAR, 22nd June 1926.—The Sheriff-Substitute having resumed consideration of the case, in respect that the Inspector of Poor of the Parish of has undertaken to his satisfaction to make due arrangements for the safe custody of the said A. B., finds it unnecessary to proceed further with this application, except in so far as regards expenses; and before further advising, appoints the Procurator-Fiscal to lodge an account of expenses, and remits the same when lodged to the Auditor of Court for taxation and report.

S. D.

Note.—The Inspector of Poor should give the Procurator-Fiscal a letter confirming the foregoing Minute.

(7) PROCEDURE WHERE INSPECTOR DOES NOT INTERVENE

(a) *Advertisement*

A. B. (*design him*), who is alleged to be a person of unsound mind and in a state threatening danger to the lieges, having been apprehended and committed to the Fife and Kinross District Lunatic Asylum at Springfield, Cupar, under Warrant of the Sheriff, as a place of safe custody *ad interim*,

NOTICE IS HEREBY GIVEN that the Sheriff has appointed Thursday, the first day of July next, at eleven o'clock forenoon, within the Sheriff Court-House, Cupar, as a diet for inquiring into the condition of the said A. B., with a view to his ultimate disposal, all in terms of the Act 25 & 26 Vict. cap. 54, section 15.

CUPAR, 22nd June 1926.

B. G.,
Procurator-Fiscal.

(b) *Acknowledgment by Inspector of Poor (to be written on principal Petition)*

CUPAR, 22nd June 1926.—As Inspector of Poor of, and on behalf of, and as authorised by the Parish Council, I hereby acknowledge to have received intimation of the foregoing Petition, Certificate, and Warrant.

E. F.

(c) *Minute for Warrant to bring Lunatic*

CUPAR, 30th June 1926.—The Petitioner moves the Court to Grant Warrant to Officers of Law to bring said A. B. from the Fife and Kinross District Lunatic Asylum at Springfield, Cupar, to the Sheriff Court-House at Cupar on Thursday, 1st July next, so as to be present in Court during the Inquiry appointed in the preceding warrant, and subject to the further orders of Court.

B. G., P.-F.

(d) *Warrant to bring Lunatic*

CUPAR, 30th June 1926.—The Sheriff-Substitute Grants Warrant as craved.

S. D.

(e) *Procedure at Inquiry*

At Cupar, the first day of July Nineteen hundred and twenty-six years.

In presence of S. D., Esquire, Advocate, Sheriff-Substitute of Fifeshire,—

COMPEARED the Petitioner, the said B. G., the said A. B., with his agent, H. J., Solicitor, Cupar; also Mr E. F., Inspector of Poor for the Parish of

The Petitioner produced :—

1. The foregoing Petition, Medical Certificate, Deliverance, and Certificate of Service on the said E. F.
2. Copy of the *Fife Herald and Journal* newspaper, dated 23rd June 1926, containing the intimation ordered by the said deliverance of 22nd June 1926.

The following witnesses were examined on Oath as to the condition of the said A. B., namely :—

For the Petitioner—(*Names and Addresses*).

For the said A. B.—(*Names and Addresses*).

CUPAR, 1st July 1926.—The Sheriff-Substitute having again considered this Petition and productions, with the evidence of the witnesses examined on Oath with regard to the condition of the said A. B., finds it proved that the said A. B. is a person of unsound mind and in a state threatening danger to the lieges, and therefore Grants Warrant to Officers of Law to commit the said A. B. to the Fife and Kinross District Lunatic Asylum at Springfield, Cupar; Authorises the Superintendent of said Asylum to receive him; and Authorises and Grants Warrant to Officers of Law to transmit him to said Asylum accordingly, therein to be detained in terms of said statute until cured or until caution be found for his safe custody in terms of the statute thereanent and further Orders of Court; Further, finds the Inspector of Poor of Parish liable to the Procurator-Fiscal in the expenses connected with this application, inquiry, and procedure in terms of the statute; of which expenses allows an Account to be given in, and when lodged, remits the same to the Auditor of Court at Cupar for taxation and report; Further, finds the said Inspector of Poor liable for such sum as may be necessary for the maintenance of the said A. B. in said Asylum as the same may be ascertained; And appoints a note thereof to be lodged, in order that, if approved, decree may be pronounced for the same in favour of the Procurator-Fiscal or in favour of the Superintendent or Keeper of said Asylum.

S. D.

(f) Decree for Expenses

CUPAR, 8th July 1926.—The Sheriff-Substitute, having considered the Account of the Procurator-Fiscal's expenses, Approves of the Auditor's Report taxing the same at £ , and ordains the Inspector of Poor of the Parish of to make payment of that sum to the Procurator-Fiscal of Court accordingly, and decerns. S. D.

(g) Decree for Maintenance

CUPAR, 10th July 1926.—The Sheriff-Substitute, having considered the note of the sum necessary for the maintenance of the said Lunatic in said Asylum, Approves of the same; Finds the said Inspector of Poor liable in payment of the sum of per , and ordains him to make payment thereof accordingly to the Keeper of said Asylum, and decerns. S. D.

8. INDICTMENT AND LISTS

A. B., Prisoner in the Prison of Edinburgh, you are indicted at the instance of the Right Honourable , His Majesty's Advocate, and the charge against you is that, on 20th April 1926, in a shop in Nicolson Street, Edinburgh, occupied by John Cruikshank, Draper, you did steal a shawl and a boa; and you have been previously convicted of dishonest appropriation of property.

By Authority of His Majesty's Advocate,
J. G. B.,
Procurator-Fiscal of Midlothian.

LIST OF PRODUCTIONS

1. Declaration of accused, dated 13th May 1926.
 2. Extract Conviction of Fraud, Sheriff Court, Dundee, 2nd April 1921, with schedule of two previous convictions, all applying to the accused.
- Label No. 1. A shawl. J. G. B., P.-F.

LIST OF WITNESSES

1. The said John Cruikshank.
 2. Peter Smith, 52 Rose Street, Edinburgh.
 3. Thomas Anderson, 18 Queen Street, Edinburgh.
- 4/5. Andrew Smith and Robert Beveridge, both Police Constables, Edinburgh.
J. G. B., P.-F.

9. FORMS OF CITATIONS

(1) ACCUSED PERSON

A. B., within designed,—Take Notice, that you will have to compare before the Sheriff of Forfarshire within the Sheriff Court at Dundee, upon the third day of July 1926, at eleven o'clock forenoon, for the first diet, and also

before the Sheriff of Fife and Kinross, in the Sheriff Court at Cupar, on the thirteenth day of July 1926, at eleven o'clock forenoon, for the second diet, to answer to the Indictment against you to which this Notice is attached.

Served on the twenty-sixth day of June 1926 by me,

J. G.,

A. S., Witness.

Warder, Prison of Dundee.

(2) ACCUSED PERSON (UNDER § 31)

A. B., within designed,—Take Notice, that the Crown Agent has received intimation that you intend to plead Guilty to the Charge on which you have been committed for trial, and that you will have to compare before the Sheriff of Forfarshire within the Sheriff Court-House at Dundee, upon the thirteenth of July 1926, at eleven o'clock forenoon, to answer to the Indictment to which this Notice is attached.

Served on the seventh day of July 1926 by me, J. G.,

Warder, Prison of Dundee.

(3) WITNESS

To ANDREW THOMSON, Miller, Burnside Mills, Falkland.

You are hereby cited to attend the Sheriff Court, County Buildings, Cupar, on Tuesday, the thirteenth day of July 1926, at eleven o'clock forenoon, and at any adjourned diet, to bear Witness for the Prosecution in the Indictment at the instance of His Majesty's Advocate against A. B., Prisoner in the Prison of Dundee.

Served this seventh day of July 1926 by me, P. A., Sheriff Officer.

Note.—In citing witnesses on behalf of the accused, substitute the word "Defence" for "Prosecution" in this form.

(4) EXECUTION OF CITATION OF ACCUSED

I, J. G., on the twenty-sixth day of June 1926, duly served on A. B., Prisoner in the Prison of Dundee, the Indictment against him with a Notice of Compareance thereto attached, for the first diet in the Sheriff Court at Dundee on the third day of July 1926, and for the second in the Sheriff Court at Cupar on the thirteenth day of July 1926.

J. G.,

Warder, Prison of Dundee.

A. S., Witness.

Note.—Where the Indictment is served at the domicile of citation fixed in the Bail Bond, the following may be added:—"This I did by leaving a copy of said Indictment with the said Notice of Compareance attached for the said accused in the hands of C. D., Sheriff Clerk Depute of Fifehire, within the Sheriff Clerk's Office at Cupar, being the domicile of citation fixed in the Bail Bond subscribed by the said accused."

10. NOTICE OF SPECIAL DEFENCE

(1) ALIBI

Graham, for the panel, stated that the panel pleaded not guilty, and particularly that on the afternoon of (Wednesday) 9th June 1926 from three

until half-past five o'clock (between which times the alleged crime is said to have been committed), he was in the public-house in College Street, St Andrews, occupied by C. D., in company with E. F. and G. H., who are to be called as witnesses for the defence.

THOS. GRAHAM.

(2) SELF-DEFENCE

Graham, for the panel, stated that the panel pleaded not guilty, and specially that on the occasion libelled he was acting in self-defence, he having then been assaulted by the said C. D.

THOS. GRAHAM.

11. DYING DEPOSITION

At Edinburgh, and within the Royal Infirmary there, the tenth day of June Nineteen hundred and twenty-six years. In presence of R. L., Esquire, Sheriff-Substitute of the Lothians and Peebles, compeared J. G., Carpenter, 110 Lothian Road, Edinburgh, and he having been solemnly sworn by the Sheriff-Substitute to tell the truth, depones as follows :—(*Take in statement*) ; and declares that owing to weakness he cannot at present write ; all which is truth as he shall answer to God.

R. L., Sheriff-Substitute.

G. H., Witness.

J. K., Witness.

The foregoing Deposition, written on the two preceding pages by G. H., Sheriff Clerk Depute of Midlothian, was of the date which it bears freely and voluntarily emitted by the therein-designed J. G. while in his sound mind and sober senses, and after having been sworn as aforesaid ; and the same is now signed in his presence by the said Sheriff-Substitute after it had been read over to him, as he declared he could not at present write. All in presence of G. H. and J. K. (*design them*).

R. L.

G. H., Witness.

J. K., Witness.

Note.—If the witness is able to sign his name, substitute the following words :—“ and the same on being read over was adhered to by him, and was subscribed by him and the said Sheriff-Substitute in his presence, before these witnesses, G. H. and J. K.” (*design them*).

12. PETITION TO BRING WITNESS FROM PRISON

EDINBURGH, 10th June 1926.

UNTO THE HONOURABLE THE SHERIFF OF THE LoTHIANS AND PEEBLES

The PETITION of J. G. B., Procurator-Fiscal of Court,

HUMBLY SHEWETH,—

That E. F., Prisoner in the Prison of Edinburgh, is a necessary witness in a charge of theft against A. B., prisoner in said Prison, who is to be tried before your Lordship and a jury within the Sheriff Court-House here on 14th June current, and your Petitioner is desirous to secure the attendance of the said E. F. as such witness at said trial.

May it therefore please your Lordship to Grant Warrant to Officers of Law to bring the said E. F. from the Prison of Edinburgh to the Sheriff

Court-House at Edinburgh on 14th June current, at eleven o'clock forenoon, to give evidence for the Prosecution in said charge, and thereafter to reconvey him to said Prison of Edinburgh, and lodge him therein; and to direct that the said E. F. shall be produced wearing his own clothing.

According to Justice,

J. G. B., P.-F.

EDINBURGH, 10th June 1926.—The Sheriff-Substitute having considered the foregoing Petition, Grants Warrant and directs as craved. R. L.

13. PETITION TO APPREHEND ABSCONDING WITNESS

(Heading, etc., as at p. 314)

That PETER SMITH, 52 Rose Street, Edinburgh, who is a material witness for the Prosecution in an Indictment at the instance of the Right Honourable , His Majesty's Advocate, against A. B., Prisoner in the Prison of Edinburgh, charging him with the crime of theft, has absconded from the dwelling-house at 52 Rose Street, Edinburgh, aforesaid, occupied by him, without leaving any information as to the place at which he may be found, in order, as your Petitioner has good reason to believe, to avoid giving evidence at the trial in said Indictment before a Sheriff and Jury Court, to be held within the Sheriff Court-House at Edinburgh on 14th June 1926.

May it therefore please your Lordship to examine on Oath Andrew Smith, a Constable of the Edinburgh City Police, as to the facts above set forth, and to Grant Warrant to Officers of Law to search for and apprehend the said Peter Smith, and bring him before you for examination in the premises, and thereafter to commit him to the Prison of Edinburgh, therein to be detained until the trial of the said A. B., or until the said Peter Smith finds sufficient caution acted in the Books of Court for his compearance at the said trial to bear witness as aforesaid.

According to Justice,

J. G. B., P.-F.

At Edinburgh, the tenth day of June 1926. The Sheriff-Substitute having considered the foregoing Petition and examined on Oath Andrew Smith, a Constable of the Edinburgh City Police, in support of the application, Grants Warrant to Officers of Law to search for and apprehend the said Peter Smith, and if necessary to detain him in a police station house, police cell, or other convenient place, and bring him for examination, and, if necessary for the execution of the foresaid purpose, Grants Warrant to open all shut and lock-fast places. R. L.

14. PROCEDURE UNDER § 31

(1) LETTER TO THE CROWN AGENT

CUPAR, 14th June 1926.

SIR,—I, as Procurator for A. B., Prisoner in the Prison of Dundee, who is accused of theft [*add, where appropriate, and previous conviction*], do hereby

give you notice in terms of section 31 of the Criminal Procedure (Scotland) Act, 1887, that he desires to have his case at once disposed of, and declares his intention to plead guilty.

I am,

Sir,

Your obedient Servant,

The Crown Agent,
Edinburgh.

E. F.,
Pror. for A. B.

(2) INTERLOCUTOR (SCHEDULE M)

CUPAR, 13th July 1926.—The Sheriff remits the said A. B. to the High Court of Justiciary for sentence on the foregoing plea of guilty. S. D.

Note.—For forms of interlocutors committing an accused until liberated in due course of law after a letter is granted under section 31, see pages 305 and 306.

15. PROCEDURE IN A TRIAL BY THE SHERIFF AND A JURY

At Cupar the seventh day of June Nineteen hundred and twenty-six.

Sitting in judgment, S. D., Esquire, Advocate, Sheriff-Substitute of Fife.

Intran A. B., C. D., and E. F., Panels, indicted and accused as in the preceding Indictment.

For the Prosecution : The Procurator-Fiscal.

For the Panels : Mr G. H., Solicitor, Cupar.

The said A. B., C. D., and E. F., being called on to plead to the foregoing Indictment, plead not guilty ; and plead a special defence which is in the following terms :—

“The said accused at the time said offence is alleged to have been committed were not at said place alleged, but were each in their respective dwelling-houses at Freuchie aforesaid.”

(Signed) G. H., Solicitor, Cupar,
Agent for accused.

(Signed) S. D.

The Sheriff-Substitute adjourns the diet till the 18th June current.

DUDLEY STUART.

Order that Jury shall consist of men only or women only.

Eo die. The Sheriff-Substitute, in pursuance of the powers conferred upon him by section 1 of the Sex Disqualification (Removal) Act, 1919 (9 & 10 Geo. V. c. 71), orders that the Jury summoned for the trial of the case shall consist of men only [*or, women only, as the case may be*]. S. D.

In the Sheriff Court of the Sheriffdom of Fife and Kinross held at Cupar on the eighteenth day of June Nineteen hundred and twenty-six.

Sitting in judgment C. J., Esquire, K.C., Sheriff of Fife and Kinross.

The diet being again called, re-compeared the said A. B., C. D., and E. F., Panels.

For the prosecution : The Procurator-Fiscal.

For the Panels : Mr G. H., Solicitor, Cupar.

The accuseds, being again called on to plead to the foregoing Indictment, again plead not guilty.

The Sheriff remits the Panels with the Indictment to the knowledge of an Assize, and allows the Panels a proof in exculpation and alleviation.

The following fifteen persons were balloted to pass upon the Assize :—

(Names and Addresses of Jurors)

all of whom were lawfully sworn, and no objections made to the contrary,—the Indictment having been read over to them before the oath was administered.

A written Special Defence was produced on behalf of the accuseds, and is as follows :—

“The said accuseds at the time said offence is alleged to have been committed were not at said place alleged, but were each in their respective dwelling-houses at Freuchie aforesaid.” (Signed) G. H., Solicitor, Cupar, Agent for accused.

The said Special Defence was here read.

The Medical Report mentioned in the List of Productions was produced on behalf of the Prosecution, as were also the Declarations of the accuseds mentioned in the List.

The following witnesses were adduced, sworn, and examined in support of the Indictment, viz. :—

(Names and Addresses of Witnesses)

The Declarations of the accuseds were here read over to the Jury without objection taken.

The Prosecutor stated that the evidence in support of the Indictment was closed.

The following witnesses were adduced, sworn, and examined in exculpation :—

(Names and Addresses of Witnesses for the Defence)

The Procurator for the Panels stated that the evidence in exculpation was closed.

The Prosecutor and the Agent for the Panels severally addressed the Jury ; and the Sheriff summed up the evidence, and directed the Jury.

The Jury unanimously find the Panels guilty as libelled.

The Sheriff, in respect of the above verdict, sentences the Panels to three months' imprisonment each.

J. K.,
Sheriff Clerk of Fife.

16. CAPITAL PUNISHMENT

(1) DEATH WARRANT

By the Honourable Lord Z.

WHEREAS by the verdict of an Assize returned this day in the trial of A. B., Prisoner in the Prison of Perth, WHEREBY the jury found him guilty of the crime of Murder as libelled, in respect whereof I, the said Lord Z., decerned and adjudged the said A. B. to be carried from the Bar to the Prison of Perth, therein to be detained till the nineteenth day of May next, and upon that day between the hours of eight and ten o'clock forenoon within the walls of the said Prison of Perth by the hands of the Common Executioner to be

hanged by the neck upon a gibbet until he be dead, and his body thereafter to be buried within the walls of the said Prison of Perth : I THEREFORE hereby ordain and require the Keeper of the Prison of Perth to receive and detain the said A. B. in the Prison of Perth, and thereafter the Magistrates of Perth to see the remainder of the said sentence carried into execution, all as they shall severally be answerable at their highest peril.

Given at Perth the twenty-third day of April Nineteen hundred and twenty-six.

(2) PUBLIC INQUIRY

At Perth, and within the Sheriff Court-House there, the nineteenth day of May Nineteen hundred and twenty-six years.

In presence of C. D., Esquire, Sheriff-Substitute of the County of Perth.

COMPEARED E. F., Procurator-Fiscal of Court, for the public interest.

COMPEARED F. G., Governor of His Majesty's Prison of Perth, who being solemnly sworn and examined depones :—I had under my custody in the Prison of Perth A. B., previous to his trial before the High Court of Justiciary at Perth, on a charge of Murder, on 23rd April last. I know that he was convicted at that Court on 23rd April last, and sentence of death was pronounced against him. That was for the crime of Murder. I know that he was sentenced to death by the Honourable Lord Z., and after sentence he was removed to the Prison of Perth. Since that date he has been under my charge. I was present this morning within the Prison of Perth when the sentence of death was carried into effect on the said A. B. The execution was performed by the Public Executioner. I thereafter identified the dead body of the said A. B. The sentence was carried into effect about two minutes past eight o'clock this morning. The body has been buried within the precincts of the prison. All which is truth as I shall answer to God.

COMPEARED J. K., Depute Town-Clerk, Perth, who being solemnly sworn and examined depones :—I was present this morning within His Majesty's Prison of Perth as representing the Town-Clerk of Perth. I saw the sentence of death executed on A. B. I have the death-warrant, which I now produce. After the execution of said sentence, the declaration required by the Capital Punishment Amendment Act, 1868, was subscribed by the presiding Magistrates and others, and I now produce the same. I also produce a certificate by the Medical Officer of the Prison certifying the death of the said A. B. All which is truth as I shall answer to God.

COMPEARED F. G., who being solemnly sworn and examined depones :—I am one of the Magistrates of the Burgh of Perth deputed to make the arrangements for seeing that the sentence of death on A. B. was duly carried out. I made these arrangements and I saw them carried out this morning. Everything was carried out in the most satisfactory manner and expeditiously done. Before the execution I spoke to the man and asked if he was A. B. He replied that he was. I asked him if he had anything to say, and he replied that he had not, but that he was prepared to meet his God. He also added that he had been very well treated by the Officials of the Prison. All which is truth as I shall answer to God.

COMPEARED L. M., second-class Warder in the Prison of Perth, who being solemnly sworn and examined depones :—I was present this morning at the execution of A. B. I have been in attendance on him and have seen him

every day almost since his conviction. I was with him this morning between the hours of six and eight o'clock. The night Officer handed him over to me at six o'clock this morning. I saw his dead body after the sentence was carried into effect. All which is truth as I shall answer to God.

COMPEARED N. O., Medical Officer of the Prison of Perth, who being solemnly sworn and examined depones :—I have frequently seen A. B. in the Prison since his sentence. I saw him this morning previous to his execution. I was present when he was executed. I examined his body after the sentence had been carried into effect. I found that he was dead. I granted a certificate to that effect, which I now see. All which is truth as I shall answer to God.

Note.—Each Deposition is signed by the witness and the Sheriff-Substitute. The various declarations and certificates will be found annexed to the Public Notice.

(3) PUBLIC NOTICE

NOTICE of Execution of SENTENCE OF DEATH passed on A. B. by the Honourable Lord Z., at Perth, on the 23rd day of April 1926, having been carried into effect within the walls of the Prison of Perth, between the hours of eight and ten o'clock a.m. on the 19th day of May 1926.

Copies

We, the undersigned, hereby declare that SENTENCE OF DEATH was this day executed on A. B., in the Prison of Perth, in our presence.

Dated this nineteenth day of May One thousand nine hundred and twenty-six years.

G. H., Magistrate.

H. I., Magistrate.

J. K., Depute Town-Clerk.

F. G., Governor, H.M. Prison, Perth.

N. O., Medical Officer.

P. Q., Chaplain.

I, N. O., the Surgeon of the Prison of Perth, hereby certify that I this day examined the body of A. B., on whom SENTENCE OF DEATH was this day executed in the Prison of Perth, and that, on examination, I found that the said A. B. was dead.

Dated this nineteenth day of May One thousand nine hundred and twenty-six years.

N. O., Surgeon of the Prison of Perth.

I, C. D., Esquire, Advocate, Sheriff-Substitute of Perthshire, after public inquiry held before me within the Sheriff Court-House, Perth, this day, in terms of the thirteenth section of the Capital Punishment Amendment Act, 1868, have found, and hereby report and declare, that the SENTENCE OF DEATH pronounced upon A. B., upon the twenty-third day of April Nineteen hundred and twenty-six, at Perth, by the Honourable Lord Z., was this morning duly executed within the Prison of Perth.

Given under my hand at Perth this nineteenth day of May Nineteen hundred and twenty-six years.

C. D.

Note.—In Schedule for Registrar, the cause of death is entered thus :—“Hanging by Public Executioner ; sentenced to death at High Court, Perth, on 23rd April 1926.” The place of interment :—“Within Prison Walls.”

17. PROBATION OF OFFENDERS ACT, 1907

Note.—The following forms are intended for use in proceedings upon Indictment. The Summary Jurisdiction (Scotland) Act, 1908, furnishes a set of forms for use in Summary Procedure. The forms here furnished (except the Bond) will be written or printed upon sheets attached to the original Indictment, the necessary variations being made to meet the circumstances of each case. A form of Order varying or extending the period of a Probation Order is included in the forms relating to Summary Procedure, and may be adapted to procedure on Indictment.

(1) PROBATION ORDER

CUPAR, 8th June 1926.—The Sheriff-Substitute being of opinion that it is expedient to release the accused on probation, under the Probation of Offenders Act, 1907, orders that the accused be discharged on entering into his own bond to observe the following conditions of discharge, viz. :—

- (1) To appear for sentence when called on at any time within six months from this date, under a penalty of ten pounds.
- (2) In the meantime to be of good behaviour.
- (3) To remain during the said period under the supervision of E. F., Probation Officer (*address*), and to conform to his directions as to conduct and residence.
- (4) To remain in any employment which he may obtain or which may be found for him, unless he has reasonable excuse for leaving the same; and to perform the duties assigned to him in such employment.
- (5) Not to associate with thieves or other undesirable persons or frequent undesirable places.
- (6) To abstain from intoxicating liquor.

C. D.

(2) BOND OF PROBATION

At Cupar, the eighth day of June Nineteen hundred and twenty-six years.

COMPEARED A. B. (*design as in Indictment*), who was this day charged before the Sheriff and Jury Court here with the crime of Theft, when he was discharged conditionally under the Probation of Offenders Act, 1907, on his entering into this Bond. Therefore he hereby judicially Binds and Obliges himself, in terms of said Act and of the Order of Court, to observe the following conditions of his discharge, of which he hereby acknowledges he has received a notice in writing, viz. :—

That he will appear for conviction and sentence when called on at any time within six months from this date, under a penalty of ten pounds.

That he will in the meantime be of good behaviour.

That during said period he will remain under the supervision of E. F. (*address*), as Probation Officer, to whose directions as to conduct and residence he will be bound to conform.

That he will not without reasonable excuse and without notice to the Probation Officer leave any employment which he may obtain or which may be found for him, and shall perform the duties assigned to him in such employment.

That he will not associate with thieves or other undesirable persons, or frequent undesirable places.

That he will abstain from intoxicating liquor.

A. B.

Note.—A Notice will be delivered to the accused setting forth the conditions of the Bond.

(3) PRELIMINARY OATH

At Cupar, the 23rd day of August 1926. In presence of C. D., Esquire, Sheriff-Substitute of Fifeshire, compeared E. F., Probation Officer, within designed, who being solemnly sworn and examined depones that the said A. B. has failed to observe the conditions of his bond in respect that (*set forth shortly particulars as to such failure*). All which is truth as the deponent shall answer to God.

E. F.

C. D.

(4) WARRANT TO SUMMON

Eo die. The Sheriff-Substitute Grants Warrant to Officers of Law to summon the said A. B. to appear for sentence on the within Indictment at eleven o'clock forenoon on 2nd September next, in the Sheriff Court at Cupar.

C. D.

Note.—If preferred, a warrant to arrest may be granted in the form furnished in connexion with the initial petition (*supra*, p. 303).

(5) SENTENCE

CUPAR, 2nd September 1926.—Compeared the said A. B. The Sheriff-Substitute having made inquiry and being satisfied that the said A. B. has failed to observe the conditions of his Bond, sentences him to six months' imprisonment from this date.

C. D.

18. PROCEDURE UNDER INEBRIATES ACTS, 1879 TO 1900

(1) INDICTMENT

The Indictment is in the usual form, except that the following clause is added at the end :—

“ And the said offence, which is an offence punishable with imprisonment, was committed by you while you were under the influence of drink, or drunkenness was a contributing cause of the offence ; and you are a habitual drunkard within the meaning of the Inebriates Acts, 1879 to 1900, and are liable to be dealt with under these Acts, and particularly under the 23rd section of the Inebriates Act, 1898.”

(2) PROCEDURE

The procedure where the accused is to plead not guilty is the same at the first and second diets up to the point where the Jury find the Panel guilty of the crime charged. It then proceeds as follows :—

The Panel was then asked to plead to the charge of being a Habitual Drunkard as libelled, and he pled not guilty. The same Jury were re-sworn.

The following witnesses were adduced, sworn, and examined on the charge of the Panel being a Habitual Drunkard, viz. :—

(*Here follow the names and addresses of witnesses*)

No. 3 of the List of Productions was produced in evidence.

No witnesses were tendered in exculpation.

The Sheriff directed the Jury as to the charge of the Panel being a Habitual Drunkard.

The Jury unanimously find the Panel guilty of being a Habitual Drunkard within the meaning of the Inebriates Acts, 1879 to 1900, as libelled.

P. Q.,

Sheriff Clerk.

The Sheriff finds that the contravention of the Children Act, 1908, § 12, libelled was committed by the accused while under the influence of drink, and in respect of the Verdict of the Jury Decerns and Adjudges the Panel to be sent to the State Inebriate Reformatory, Perth, which is a certified Inebriate Reformatory, and to be there detained for the period of three years from this date, and for these purposes Grants Warrant to all concerned.

C. D.

19. ALIENS ACTS, 1914 AND 1919, AND ALIENS ORDER, 1920

Under the above Acts and Order in Council, the Secretary of State may, if he thinks fit, make a Deportation Order requiring an Alien to leave the United Kingdom within a time fixed by the Order, and thereafter to remain out of the United Kingdom, if it is certified to him by any Court that the alien has been convicted by that Court either of any crime or offence for which the Court has power to impose *imprisonment without the option of a fine*, or of certain statutory contraventions, and if the Court recommend that a Deportation Order should be made in the case, either in addition to or in lieu of sentence. Where this procedure is to be adopted the prosecutor, *prior to the trial*, serves the accused with a notice in the form undermentioned. If the alien denies alienage, the onus of proving that he is not an alien lies on him, and the prosecutor, after conviction on the principal charge, may also lead evidence to prove that the accused is an alien. The Certificate signed by the judge is forthwith sent by the Clerk of Court to the Secretary of State for Scotland, and a copy of it is sent along with the accused to the prison to which he is committed, if he is sentenced to imprisonment. The Secretary of State issues the Deportation Order.

The procedure and sentence on the original charge are in the usual form, the following being added to the sentence: "and that the said A. B. be recommended for deportation in addition to the above sentence." Reference is made to the Act of Adjournment of 21st July 1920 for the forms of Certificate to be used in different circumstances, but forms of notice to the accused and of the Certificate most commonly required are appended.

(1) NOTICE TO ACCUSED

To A. B.

Take notice that in the event of your being convicted on the Indictment which has this day been served upon you citing you to appear within
on for the first diet, and on for the

second diet, the Court may recommend the granting against you of a Deportation Order under the Aliens Restriction Acts, 1914 and 1919, and the Aliens Order, 1920, and that if you deny that you are an alien the onus lies on you, under Section 1 (4) of the Aliens Restriction Act, 1914, to prove your denial.

Dated at this (*date*).

(Signed) H. J.,
Procurator-Fiscal of

(2) CERTIFICATE BY THE COURT

In the Sheriff Court of held at on the
day of Nineteen hundred and .
Before C. D., Sheriff-Substitute of .

I hereby certify that A. B., to whom the particulars shown in the annexed Schedule hereto relate, having been found by the Court to be an alien, was this day convicted of the offence shown in the said Schedule, being an offence specified in § 12 (6) (*a*) of, and in the Third Schedule to, the Aliens Order, 1920; and was sentenced to be committed to one of His Majesty's Prisons to be detained therein for the space of six months [*or otherwise as the case may be*]; and that the Court recommend that a Deportation Order be made in the case of the said A. B. in addition to the said sentence [*or, in lieu of sentence*].

C. D.

SCHEDULE

Name : A. B.

Nationality : Russian.

Age : 25.

Dependents (if any) : None.

Offence : Theft and previous conviction.

Sentence : Six months' imprisonment.

Prison to which committed : Dundee.

Parish and County or Burgh in which offence committed : Parish of Elie,
County of Fife.

C. D.

20. CRIMINAL APPEAL (SCOTLAND) ACT, 1926

A complete set of forms under this Act is provided by the Act of Adjournal of 27th October 1926, to which reference is made. Forms of Notices of Appeal and Notices of Application for Leave to Appeal are officially issued by the Clerk of Justiciary, and may be obtained from him or from the Governor of the Prison if appellant is in custody. It is desirable that these official forms should be used.

APPENDIX II

FORMS IN SUMMARY PROCEDURE

IN this Appendix there are given in consecutive order the statutory forms provided by Schedules C, D, E, F, and H to the 1908 Act, and there have also been inserted forms applicable to such additions to and modifications on the statutory forms as are likely to arise in practice, with explanatory notes bearing on the different forms. The statutory forms of the charges have, in the main, been adhered to, but some of them have been altered or deleted in this edition owing to legislation passed since the first edition was published. Schedule G, which deals exclusively with expenses, has been inserted at the end of the forms.

SCHEDULE C

§§ 16, 18, 19

FORMS OF COMPLAINT AND CHARGES

Under the Summary Jurisdiction (Scotland) Act, 1908

In the Court of at
The Complaint of Procurator-Fiscal (or Burgh Prosecutor)
(or other party entitled to prosecute).

A. B. (name and address sufficient to distinguish person) (or at present in custody), you are charged at the instance of the Complainer, that on 20th 19 , in (or at) you did (set forth Charge as in Forms).

Where Previous Convictions are libelled, add—And you have been previously convicted, as in the List annexed; or where a Statute imposes increased penalties for a Second or Third Offence add—And such offence is a Second (or Third) Offence, you having been previously convicted, as in the List annexed. A statutory charge will conclude thus—Whereby you are liable to the penalties set forth in said section (or in § of said Act, or otherwise as the case may be, or if preferred the penalties may be shortly set forth).

Previous Convictions where libelled may be detailed thus :—

List of previous convictions applying to you.

Date.	Place of Trial.	Court.	Offence.	Sentence.

C. D., Procurator-Fiscal (or Burgh Prosecutor),
or
E. F., Complainer,
or
G. H., Agent for Complainer.

1. CHARGE AGAINST A COMPANY

- You are charged, etc., that you being Secretary of *A. B. & Co. Ltd.* (*address*), and as such liable to be dealt with as representing said company, you did by your said company, on _____ at _____ (*set forth charge*).

You are charged, etc., that you being (*set forth capacity*) (e.g., master of the steamship _____; occupier of the house No. _____ Street, etc.), you did on _____ at _____ (*set forth charge*).

See case of *Lairds* (1905), 4 Adam, 537, which sanctions a charge in this form.

You are charged, etc., that on _____ at _____ (1) you did (*set forth charge in which all concerned*); (2) you the said *A. B.* and *C. D.* did (*set forth charge*); (3) you the said *E. F.* did (*set forth charge*); and (4) you the said *G. H.* did (*set forth charge*).

5. VARIATIONS IN SETTING FORTH PENALTIES INCURRED

- (a) Whereby you are liable to a penalty not exceeding £ , and in default of payment to imprisonment in terms of the Summary Jurisdiction (Scotland) Act, 1908, § 48.
- (b) Whereby you are liable to a penalty not exceeding £ , and in default of payment to imprisonment in terms of the Summary Jurisdiction (Scotland) Act, 1908, § 48, or without the option of a fine to imprisonment for a period not exceeding .
- (c) Whereby you are liable to imprisonment for a period not exceeding .
- (d) Whereby you are liable to the penalties set forth in said section.
- (e) Whereby you are liable to the penalties set forth in § of said Act.
- (f) Whereby you are liable to the penalties set forth in said section and in § 48 of the Summary Jurisdiction (Scotland) Act, 1908.

For specimen of forms of Complaint, see forms infra, p. 342.

NOTES ON SCHEDULE C

Where the penalty incurred is a pecuniary one, imprisonment being only in default of payment, it is suggested that form (a) should be adopted, but one or other of the forms (d), (e), and (f) would also be applicable in such a case. Where the Court has the power to impose either a pecuniary penalty or imprisonment without the option of a fine, form (b) may be adopted, but forms (d) and (e) might also be applicable. Where the penalty is imprisonment in the first instance, form (c) is suggested, although forms (d) and (e) might also be applicable.

FORMS OF CHARGE CONTAINED IN SCHEDULE C

For convenience in reference the statutory forms have been supplemented by inserting the names of the common law offences and the short title of, and a reference to, the Act in the statutory offences. Owing to legislation passed since the first edition was published, it has been found necessary to delete some of the forms relating to statutory offences, and to alter others, in order to bring them up to the present time. Care must be taken to see that these forms are not still further affected by subsequent legislation.

The following Forms are additional to those contained in Schedule A to the Criminal Procedure (Scotland) Act, 1887, all of which, in so far as applicable to charges which may be tried summarily, shall be held to be incorporated in this Schedule :—

ASSAULT

You did assault C. D. and strike him with your fists.

BREACH OF THE PEACE

You did conduct yourself in a disorderly manner and commit a breach of the peace.

You did threaten violence to the lieges and commit a breach of the peace.

You did fight and commit a breach of the peace.

EXPOSURE, INDECENT

You did publicly expose your person in a shameless and indecent manner in presence of the lieges.

FRAUD

You did obtain from *C. D.* board and lodging to the value of 12s., without paying or intending to pay therefor.

MALICIOUS MISCHIEF

You did maliciously knock down 22 yards of the coping of a wall forming the fence between two fields on said farm.

You did maliciously place a block of wood on the railway line and attempt to obstruct a train.

RECKLESS DRIVING

You did drive a horse and cart recklessly to the danger of the lieges.

THEFT

You did break into a poultry house and steal three fowls.

You did steal a coat which you obtained from *C. D.* on the false representation that you had been sent for it by her husband.

having received from *C. D.* £6 to hand to *E. F.*, you did on (*date*) at (*place*) steal said sum.

having received from *E. F.* a watch in loan, you did on , at , sell it to *C. D.*, and steal it.

having found a watch, you did, without trying to discover its owner, sell it on at " to *C. D.*, and steal it.

ARMY ACT (44 & 45 Vict. c. 58)

You did receive from *C. D.*, a private in the Third Battalion

Militia, a military jacket and waist-belt, contrary to the Army Act, § 156; whereby, etc.

BANKRUPTCY (SCOTLAND) ACT, 1913

You did obtain credit from *C. D.* to the extent of £12 without informing him that you were an undischarged bankrupt, contrary to the Bankruptcy (Scotland) Act, 1913, § 182; whereby, etc.

You, being a debtor in a process of sequestration, and within four months next before the presentation of the petition for your sequestration, did pawn, otherwise than in the ordinary way of trade, three dozen pairs of shoes which you had obtained on credit from *C. D.*, and had not paid for, contrary to the Bankruptcy (Scotland) Act, 1913, § 178 (A), subsection (5); whereby, etc.

BETTING ACT, 1853 (16 & 17 Vict. c. 119, and 37 & 38 Vict. c. 15)

You, being the occupier of said house, did use the same for the purpose of betting with persons resorting thereto, contrary to the Betting Act, 1853, §§ 1 and 3; whereby, etc.

EDUCATION (SCOTLAND) ACT, 1908 (8 Edw. VII. c. 63)

[illegible]

EXPLOSIVES ACT, 1875 (38 & 39 Vict. c. 17)

being an unauthorised place you did keep for sale 150 lbs. of gunpowder, contrary to the Explosives Act, 1875, § 5; whereby, etc.

You did keep 156 lbs. of gunpowder, and did not keep it in a fireproof safe, contrary to the Explosives Act, 1875, § 22, as amended by § 3, subsection (1), Mode B, of the Order in Council (No. 16) ; whereby, etc.

(FISHERY ACTS) HERRING FISHERY (SCOTLAND) ACTS, 1889 & 1890 (52 & 53
Vict. c. 23 and 53 & 54 Vict. c. 10)

, being master of the steam trawler *G. N.*, you did use the method of fishing known as otter trawling, contrary to the Herring Fishery (Scotland) Act, 1889, § 6, as amended by the Herring Fishery (Scotland) Act Amendment Act, 1890, § 3; whereby, etc.

being master of the steam trawler *G. N.*, you did use the method of fishing known as otter trawling, contrary to By-law No. made by the Fishery Board for Scotland, dated ; whereby, etc.

(FOOD AND DRUGS ACTS) SALE OF FOOD AND DRUGS ACT, 1875 (38 & 39
Vict. c. 63), AND SALE OF FOOD AND DRUGS AMENDMENT ACT, 1879
(42 & 43 Vict. c. 30)

You did, in response to a demand by him for twopence worth of sweet milk, sell to *E. F. (address)*, Sanitary Inspector for the County of _____, milk which was not genuine, as it contained less than 3 per cent. of milk fat (*or add when appropriate*—and less than 8·5 per cent. of milk solids other than milk fat), contrary to the Sale of Food and Drugs Act, 1875, § 6, and Sale of Food and Drugs Amendment Act, 1879, § 3, as read along with the Sale of Milk Regulations, 1901 ; whereby, etc.

(GAMING) PREVENTION OF GAMING (SCOTLAND) ACT, 1869 (32 & 33 Vict. c. 87)

You did induce *J. P.* to engage in an unlawful game called the “three-card trick,” and cheat him of £1, contrary to the Prevention of Gaming (Scotland) Act, 1869, § 3; whereby, etc.

(GAME ACTS) NIGHT POACHING ACT, 1828 (9 Geo. IV. c. 69)

You did by night enter on said land with nets for the purpose of taking game, contrary to the Night Poaching Act, 1828, § 1 ; whereby, etc. ; *or,*

You did by night unlawfully take six rabbits; contrary to, etc.

GAME (SCOTLAND) ACT, 1832 (2 & 3 Will. IV. c. 68)

You did in the daytime trespass on said lands in search or pursuit of game (*or* rabbits), contrary to the Game (Scotland) Act, 1832, § 1: whereby, etc.

POACHING PREVENTION ACT, 1862 (25 & 26 Vict. c. 114)

You were found in the possession of five hares, a net, and six net pins, which hares you had obtained by unlawfully going on land in search or pursuit of game, and which net and net pins you had used for unlawfully killing or taking game, or you had been accessory thereto, contrary to the Poaching Prevention Act, 1862, § 2 ; whereby, etc.

LANDS VALUATION (SCOTLAND) ACT, 1854 (17 & 18 Vict. c. 91)

You did present or cause to be presented to *C. D.*, Assessor for , a return in which you falsely stated that the yearly rent of your house, No. Street, , was £20, instead of £30, contrary to the Lands Valuation (Scotland) Act, 1854, § 7 ; whereby, etc.

LICENSING (SCOTLAND) ACT, 1903 (3 Edw. VII. c. 25)

A. B., hotelkeeper, Hotel, you are charged, etc., that on Sunday in your said hotel you did sell a half gill of whisky to *C. D.*, he not being a lodger in said hotel or a traveller, contrary to your certificate and the Licensing (Scotland) Act, 1903, § 53 ; whereby, etc.

You did sell a half gill of whisky to *C. D.*, who was then in a state of intoxication, contrary to your certificate and the Licensing (Scotland) Act, 1903, § 53 ; and such offence is a second offence, you having been previously convicted as in the list annexed ; whereby, etc.

You were found in a state of intoxication and incapable of taking care of yourself, and not under the care or protection of some suitable person, contrary to the Licensing (Scotland) Act, 1903, § 70 ; whereby, etc.

You did knowingly sell a glass of whisky to *C. D.*, who had been convicted of the offences mentioned in and dealt with under § 72 of the Licensing (Scotland) Act, 1903, contrary to said Act, § 72 ; whereby, etc.

ROAD TRANSPORT LIGHTING ACT, 1927 (17 & 18 Geo. V. c. 37)

You did ride upon a pedal bicycle without carrying a lamp constructed, placed, and lighted as required by law, contrary to the Road Transport Lighting Act, 1927, § 5 ; whereby, etc.

(MINES) COAL MINES ACT, 1911 (1 & 2 Geo. V. c. 50)

You did take into your working place 1 lb. of gunpowder in a paper bag, contrary to the Coal Mines Act, 1911, § 61 (2) and Order by the Secretary of State, dated 1st September 1913, § 1 (*b*) ; whereby, etc.

You did ride on a hutch without the required permission, contrary to the Coal Mines Act, 1911, § 43, subsection 2 (*b*) ; whereby, etc.

MOTOR CAR ACT, 1903 (3 Edw. VII. c. 36)

You did drive a motor car recklessly (*or* negligently) and knock down and injure *C. D.*, contrary to the Motor Car Act, 1903, § 1 ; whereby, etc.

You did drive a motor car at a speed exceeding 20 miles per hour, viz., about 32 miles per hour, contrary to the Motor Car Act, 1903, § 9 ; whereby, etc.

PAWNBROKERS ACT, 1872 (35 & 36 Vict. c. 93)

You did fail to enter in your Pledge Book the sum of 8s. 1½d., the profit charged on a loan of 25s. to *C. D.*, on security of a watch pawned by him and redeemed on _____, contrary to the Pawnbrokers Act, 1872, § 12; whereby, etc.

PEDLARS ACT, 1871 (34 & 35 Vict. c. 96)

You did act as a pedlar without having obtained a certificate, contrary to the Pedlars Act, 1871, § 4; whereby, etc.

PHARMACY ACT, 1868 (31 & 32 Vict. c. 121)

You did sell to *C. D.* a bottle of _____, which is a preparation of aconite and a poison, without distinctly labelling the said bottle with your name and address, and without making, before delivery thereof to him, the necessary entry in a book kept for that purpose, contrary to the Pharmacy Act, 1868, § 17; whereby, etc.

(POLICE ACT) BURGH POLICE (SCOTLAND) ACT, 1892 (55 & 56 Vict. c. 55)

At one o'clock on the morning of said date you did sell to *C. D.* a pie and a bottle of lemonade, contrary to the Burgh Police (Scotland) Act, 1892, § 380, subsection 6; whereby, etc.

You did play at football, to the annoyance of the residents in said street, contrary to the Burgh Police (Scotland) Act, 1892, § 381, subsection 26; whereby, etc.

You kept and still keep nine hens and a cock, which are a nuisance to the inhabitants in the neighbourhood, contrary to the Burgh Police (Scotland) Act, 1892, § 389; whereby you are liable to be ordained to remove such fowls within such time as the Court may fix.

Being a known (*or* reputed) thief, you were found in possession of a watch and chain, without being able to give a satisfactory account of your possession thereof, contrary to the Burgh Police (Scotland) Act, 1892, § 409; whereby, etc.

POOR LAW (SCOTLAND) ACT, 1845 (8 & 9 Vict. c. 83)

You did desert (*or* neglect to maintain) *C. D.*, your wife, and *E. D.* and *G. D.*, your children, whereby they have become chargeable to the said parish of _____, contrary to the Poor Law (Scotland) Act, 1845, § 80; whereby, etc.

POST OFFICE ACT, 1908 (8 Edw. VII. c. 48)

You did place in a post office letter box a lighted match in a manner likely to injure post letters, contrary to the Post Office Act, 1908, § 61; whereby, etc.

PUBLIC HEALTH (SCOTLAND) ACT, 1897 (60 & 61 Vict. c. 38)

You did consign, for the food of man, to *E. F.* the carcass of a cow which was unsound and unfit for such food, contrary to the Public Health (Scotland) Act, 1897, § 43, subsection (4); whereby, etc.

(RAILWAYS) REGULATION OF RAILWAYS ACT, 1889 (52 & 53 Vict. c. 57)

You did travel in a railway carriage without having previously paid your fare, and with intent to avoid payment thereof, contrary to the Regulation of Railways Act, 1889, § 5, subsection (3) (a); whereby, etc.

REGISTRATION OF BIRTHS, ETC. (SCOTLAND) ACT, 1854
(17 & 18 Vict. c. 80)

having on within the house in No. Street, given birth to a female illegitimate child, you did fail, within twenty-one days thereafter, to attend personally and give information to *C. D.*, registrar of births, deaths, and marriages for (*Registration District*), of the several particulars required to be registered touching such birth, contrary to the Registration of Births, Deaths, and Marriages (Scotland) Act, 1854, § 27; whereby, etc.

SALMON FISHERIES (SCOTLAND) ACT, 1868 (31 & 32 Vict. c. 123)

You did take two salmon during the annual close time by means of cobles and sweep nets, contrary to the Salmon Fisheries (Scotland) Act, 1868, § 15; whereby, etc.

SMALL DEBT (SCOTLAND) ACT, 1837 (7 Will. IV. and 1 Vict. c. 41)

You did carry off from said premises the following pointed effects, namely, *in fraudem* of *C. D.*, a pointing creditor, contrary to the Small Debt (Scotland) Act, 1837, § 20; whereby, etc.

VACCINATION (SCOTLAND) ACT, 1863 (26 & 27 Vict. c. 108)

You did refuse to allow your child, *N. B.*, aged eight months, to be vaccinated, contrary to the Vaccination (Scotland) Act, 1863, § 18; whereby, etc.

WEIGHTS AND MEASURES ACT, 1878 (41 & 42 Vict. c. 49)

You had in your possession for use for trade a counter balance which was false, and two weights which were unjust, contrary to the Weights and Measures Act, 1878, § 25; whereby, etc.

SCHEDULE D

§§ 16, 21, 23

WARRANTS OF CITATION, APPREHENSION, ETC.

EDINBURGH, 9th January 192.—The Court assigns 16th January 192 at 10 A.M., within the Sheriff-Court House, Edinburgh, as a diet in this case.

W. G., Clerk of Court.

This form only necessary if special diet required

EDINBURGH, 9th January 192.—The Court grants warrant to apprehend the said accused.

If search warrant desired, it may be in the following terms :—

Grants warrants to search the person, dwelling-house, and repositories of said accused, and any place where he may be found, and to take possession of the property mentioned or referred to in the complaint, and all articles and documents likely to afford evidence of his guilt or of guilty participation.

CITATION OF ACCUSED.—*A. B.*, above designed, you are hereby summoned to appear personally on 16th January 192 at 10 A.M., within the Sheriff Court-House, Edinburgh, to answer to the complaint against you, of which the above is a copy.

Served by me on 9th January 192 .

C. D., Police Constable.

A note in the following or similar terms may be appended to the service copy of a complaint :—

NOTE.—If you plead not guilty to the above charge, your case will be adjourned to a diet to be fixed by the Court [or, if the case is to proceed to trial at the first diet, your case will proceed to trial at such diet unless the Court grants an adjournment]. If you desire to have witnesses cited for the defence, the police will give you all reasonable assistance to cite them.

CITATION OF WITNESSES.—To *E. F.* [name and designation].

You are hereby cited to appear personally on 16th January 192 at 10 A.M., in the City Police Court, Edinburgh, to give evidence for the prosecution in the case against *A. B.* (and you are required to produce . . .).

C. D., Police Constable.

Note to be subjoined to Citations of Witnesses

Witnesses failing to attend the Court without lawful excuse are liable to be apprehended and punished.

APPREHENSION OF WITNESSES.—EDINBURGH, 16th January 192.—The Court, in respect *E. F.*, a witness in the cause, has failed to appear after being duly cited, adjourns the diet till 18th January 192 at 10 A.M., and ordains the accused and witnesses to appear personally at said diet, and grants warrant to apprehend the said *E. F.*, and to detain him in any prison or in a police cell until said diet, unless sufficient security to the amount of £ be found for his appearance at all diets of Court.

ADJOURNMENT FOR INQUIRY.—EDINBURGH, 9th January 192.—The Court, on the motion of the Prosecutor, continues the case against the accused until January 192, and meantime grants warrant to detain the accused in prison until that time [or until sufficient security to the amount of £ be found for his appearance at all diets of Court].

OFFICER'S EXECUTION OF SERVICE OF COMPLAINT ON AN ACCUSED PERSON

I, officer of law, upon the day of , lawfully summoned [name and designation of accused as in Complaint] to appear before the Court on the day of at o'clock noon, to answer to a complaint at the instance of charging him with [state offence] . This I did by delivering a copy of the complaint with citation thereto attached [state how served upon accused, whether personally or left at dwelling-house or otherwise]. *C.D.*, Police Constable.

OFFICER'S EXECUTION OF CITATION OF A WITNESS

I, _____ officer of law, upon the _____ day of _____, lawfully cited [*name and designation of witness*] to appear before the _____ Court _____ on the _____ day of _____ to give evidence for the prosecution [*or defence*] in the complaint at the instance of _____ against [*name and designation of accused*]. This I did by delivering a citation to that effect [*state how served, whether personally or left at dwelling-house or otherwise*].
C. D., Police Constable.

NOTES ON SCHEDULE D

- (1) The Act itself forms the warrant of citation (§ 21).
- (2) Warrants of apprehension and search must be signed by the judge (§ 16).

(3) A warrant of apprehension includes power if necessary to break open lockfast places, and also power for the interim detention of the accused until he can be brought before the Court (§ 23).

(4) The object of the notes appended to the form of citation is to introduce a system under which the accused, when served with his complaint, is notified as to whether or not the diet to which he is first cited is to be a pleading diet or a diet of trial.

In regard to this, reference is made to what was said on the subject on p. 160. The course which it is best to adopt must largely depend on local circumstances. In every case the procedure should be such as will not involve any hardship to the accused.

Although the minimum *induciae* are forty-eight hours, a period of from five to seven days may with advantage be allowed to intervene between service and the first diet, and from seven to ten days between service and a diet for trial where it is intended to proceed to trial at the first diet. If special *induciae* are fixed by the statute under which proceedings are taken, this must be given effect to.

Where after service intimation is given to the prosecutor, that the accused's intention is to plead not guilty, his attendance at the first diet may be dispensed with, and the case adjourned in absence on that date till the date fixed for trial, thus obviating the accused's attendance at two diets.

In the same way, where the accused is served with a notice that his case is to proceed to trial at the first diet, he may with advantage be afforded an opportunity, if he desires, of intimating a plea of guilty in sufficient time to obviate the necessity for citing witnesses.

(5) It is a common practice, and one sometimes attended with convenience, instead of serving the complaint on the accused or apprehending him, to serve the accused with a notice requesting his attendance at the Court on a date specified to answer to the charge made against him. This course was sanctioned by the decision of the High Court in the case of *Spowart* (1895), 1 Adam, 539, on the ground that the accused in the circumstances of that case had suffered no prejudice, and the authority of the case of *Spowart* was recognised in the case of *Kelly* (1907), 5 Adam, 268; but care must be taken, where this course is adopted, that it does not involve any hardship to the accused. It is suitable for cases (*a*) where in ordinary circumstances a warrant

of apprehension would be issued, but where it is considered desirable to give the accused an opportunity of attending without apprehension, or (b) to cases of a trifling nature where the accused is fully aware of the nature of the charge and is likely to plead guilty to it. In such cases as last mentioned, arrangements might be made for the postponement of the diet without the attendance of the accused if he is to plead not guilty.

(6) Attention may be drawn to the provision in § 23 (1) that a warrant of apprehension or other warrant is not required to bring before the Court a person who attends without apprehension in answer to any charge made against him. Where service by a police officer would be inconvenient or inexpedient, advantage of this provision might be taken by sending the accused by post a copy of the complaint, and requesting his attendance at Court on a specified date. Of course, if he failed to attend, formal service or execution would then be necessary.

Forms of notice applicable to varying circumstances are appended to the illustrations of procedure given (infra, p. 346).

SCHEDULE E

§§ 16, 53, 56

(See also Criminal Justice Administration Act, 1914, Act of Adjournment of 18th March 1915, and Forms given in the latter.)

MINUTES OF PROCEDURE, ETC.

Edinburgh, 9th January 192 .—*G. N.*, judge.

PLEA OF GUILTY.—Compeared the accused and, in answer to the complaint, pled guilty.

SENTENCE.—Sentence : Twenty-one days' imprisonment.

Note.—Imprisonment for less than five days is now incompetent. Criminal Justice Administration Act, 1914.

WHERE DIFFERENT PLEAS TENDERED.—Compeared the accused and, in answer to the complaint, *A. B.* pled guilty and *C. D.* pled guilty to the third charge.

SENTENCE WHERE MORE THAN ONE ACCUSED AND DIFFERENT PLEAS.—Sentence : *A. B.*, Twenty-one days' imprisonment; *C. D.*, seven days' imprisonment.

PLEA AND SENTENCE COMBINED.—Compeared the accused and, in answer to the complaint, pled guilty (*or state to what extent plea tendered*), and was sentenced to days' imprisonment (*or was fined £ and in default of payment days' imprisonment*) (*or as the case may be*).

Note.—This form will now, as regards the fine, read either “ and in default of payment within days from this date days' imprisonment,” or “ and in default of immediate payment days' imprisonment. Time was not allowed for payment in respect ” (state appropriate reason as in Criminal Justice Administration Act, 1914, § 42 (1) (2)). This applies

throughout in all cases where a fine is imposed. If time is allowed, it must not be less than seven days. When time is not allowed, this and the reason thereof must also be stated in the Extract Conviction.

PLEA OF NOT GUILTY.—Compeared the accused, who, in answer to the complaint, pled not guilty.

ADJOURNMENT.—The Court adjourned the diet to 11th January 192 at 10 A.M., and ordained the accused then to appear.

Or,

The Court adjourned the diet to 11th January 192 at 10 A.M., and ordered the accused to be imprisoned until that date or until security for £ be found for his appearance at all diets of Court.

Or,

The Court adjourned the diet to 11th January 192 at 10 A.M., and ordered the accused to appear personally at that diet under a penalty of £ in default.

TRIAL.—Edinburgh, 11th January 192 .—*G. N.*, judge.

Compeared the accused (*or* the accused failed to appear after being duly cited, *or* after receiving due intimation of this diet).

FINDING.—The Court found the accused guilty as libelled (*or* as first (*or* last) alternatively libelled, *or state to what extent found guilty*), (*or* not guilty), (*or* found the charge not proven), (*or* found *A. B.* guilty as libelled and *C. D.* guilty as second libelled (*or as the case may be*)).

IMPRISONMENT.—Sentence : days' imprisonment.

Or,

FINE.—Fined £ (*or* £ each), and in default of immediate payment days' imprisonment (*or* days' imprisonment each).

Fined £ (including £ expenses), and in default of immediate payment days' imprisonment.

(See note *supra* for form when time is not allowed for payment.)

Or,

TIME ALLOWED.—Fined £ , and in default of payment within days from this date, days' imprisonment.

Or,

CAUTION.—To find £ caution for good behaviour for months, and in default days' imprisonment.

Or,

FINE AND CAUTION.—Fined £ , and in default of immediate payment, days' imprisonment and to find £ caution for good behaviour for months, and in default days' imprisonment further.

(See note *supra* for form when time is or is not allowed for payment of a fine.)

IMPRISONMENT AND CAUTION.—To be imprisoned for days from this date and to find caution for £ for good behaviour for months thereafter, and in default days' imprisonment further,

FINE IMPOSED ON PARENT IN LIEU OF CHILD.—The Court found the accused *A. B.* guilty as libelled and fined him £1, and, in respect the said *C. D.* has conduced to the commission of said offence by habitually neglecting to exercise due care of the said *A. B.*, ordered said fine to be paid by the said *C. D.*, and in default of immediate payment sentenced the said *C. D.* to days' imprisonment.

(See note *supra* for form when time is or is not allowed for payment of a fine.)

WHIPPING.—To receive stripes with the birch-rod in presence of _____, surgeon, or, in the event of said surgeon certifying that he is unfit to undergo such punishment, ordains the said accused [*state what other alternative*].

SENTENCE DEFERRED.—Sentence deferred till _____ 192 , when accused ordained to appear.

ADMONITION.—Admonished and dismissed.

DESERTION OF DIET.—The Court, on the motion of the prosecutor, deserted the diet *pro loco et tempore*.

Where there are several accused and different sentences pronounced on each, the sentence applicable to each may be minuted under the appropriate form.

BAIL BOND

I, *C. D.*, do hereby judicially enact and bind and oblige myself as cautioner and surety that *A. B.* shall appear personally in the Sheriff Court, Edinburgh, on 16th January 192 , at 10 A.M., and at any other diet to which the cause may be adjourned, to answer to a complaint at the instance of the Procurator-Fiscal of Court, charging him with the crime of assault, and that under a penalty of £ _____ to be paid by me in case of failure, and to be recovered in the manner prescribed by the Summary Jurisdiction (Scotland) Act, 1908.

In witness whereof, etc.

E. F., Witness.

C. D.

G. H., Witness.

FORFEITURE OF BAIL CONSIGNED.—The Court, in respect of the failure of the accused to attend this diet, on the motion of the prosecutor declares the bail of £ _____ (*or a pledge, viz. _____*) deposited as security for his appearance to be forfeited, and also grants warrant for his apprehension.

FORFEITURE OF BAIL BOND.—The Court, in respect of the failure of the accused to attend at this diet, on the motion of the prosecutor declares a bond of caution granted for his appearance under a penalty of £ _____ to be forfeited ; further, ordains *C. D.*, cautioner in said bond, to be charged to make payment to the Clerk of Court of said sum within six days after such charge, and in default of payment to be imprisoned for _____ days from the date of his incarceration unless payment of said penalty be sooner made, but reserving to the said *C. D.*, within said six days to make application to the Court for an extension of time for payment of said sum if so advised, and grants warrant for the apprehension of the said *A. B.*

CHARGE TO CAUTIONER.—To *C. D. I.*, _____, officer of law, Edinburgh, hereby charge you to make payment of the sum of £ _____, being the penalty contained in bond of caution by you for *A. B.*, which

bond has been declared forfeited in respect of his non-appearance to answer to the complaint against him as provided for in said bond, the said sum to be paid by you to the Clerk of Court, Sheriff Court, Edinburgh, within six days after the date of this my charge, under pain of imprisonment for the period of days from the date of incarceration unless said sum be sooner paid.

This charge served by me on 21st January 192 . . .

E. F., Police Constable.

If you desire to obtain an extension of time for payment, application therefor to the Court must be made within six days from this date.

Forms similar to those applicable to the finding and forfeiture of bail may, with the necessary variations, be used for the finding and forfeiture of caution for good behaviour.

EXTRACT

Under the Summary Jurisdiction (Scotland) Act, 1908

In the Court of at .

Name of accused : .

Date of conviction : .

Offence of which convicted : .

IMPRISONMENT.—Sentence : Imprisonment days.

In respect of which sentence warrant is hereby granted to officers of law to convey the accused to the prison of [*place*] and for the detention of the accused therein for days from the date of imprisonment. *W. G.*, Clerk of Court.

FINE OR IMPRISONMENT (IMMEDIATE).—Sentence, £ fine or days' imprisonment. Time was not allowed for payment in respect (state reason as in the sentence itself). In respect of which sentence warrant is hereby granted to officers of law to convey the accused to the prison of [*place*] and for the detention of the accused therein until said fine is paid, but not exceeding days from the date of imprisonment.

FINE OR IMPRISONMENT (TIME ALLOWED).—Sentence, £ fine (payable within days) or days' imprisonment.

In respect of which sentence, the period allowed for payment of said fine having expired, and said fine not having been paid, warrant is hereby granted to officers of law to convey the accused to the prison of [*place*] and for the detention of the accused therein until said fine is paid, but not exceeding days from the date of imprisonment.

CAUTION.—Sentence, £ caution for good behaviour for six months (from date of conviction) or days' imprisonment.

In respect of which sentence warrant is hereby granted to officers of law to convey the accused to the prison of [*place*] and for the detention of the accused therein until said caution is found, but not exceeding days from the date of imprisonment.

FINE AND CAUTION.—Sentence, £ fine [if time was allowed for payment insert here “(payable within days)”] or days' imprisonment and £ caution for good behaviour for months (from payment of said fine or from the expiry of the period of imprisonment for non-payment)

or days' imprisonment further. (If time was not allowed for payment of the fine, insert here a statement to that effect, and the reason.)

In respect of which sentence warrant is hereby granted to officers of law to convey the accused to the prison of [place] and for the detention of the accused therein until said fine is paid and said caution is found, the detention for non-payment of said fine not exceeding days from the date of imprisonment, and the detention for failure to find said caution not exceeding days further from payment of said fine or from expiry of the term of imprisonment for non-payment thereof.

Note.—If time was allowed for payment of the fine, the extract will read :
 “In respect of which sentence, the period allowed for payment of said fine having expired, and said fine not having been paid, warrant is hereby,” etc.

IMPRISONMENT AND CAUTION.—Sentence : Imprisonment days and £ caution for good behaviour for months thereafter, or days' imprisonment.

In respect of which sentence warrant is hereby granted to officers of law to convey the accused to the prison of [place] and for the detention of the accused therein for days from the date of imprisonment, and for his further detention thereafter until said caution is found, but not exceeding days further.

The necessary variations to meet different sentences will be made on this extract. An extract in this form shall be applicable either to sentence on a plea of guilty or on conviction. Where an extract is required for production as evidence of previous conviction, any particulars as to prior convictions may be set forth in a schedule annexed to the extract.

FORMS UNDER PROBATION OF OFFENDERS ACT, 1907

COMPLAINT DISMISSED, NO CONVICTION RECORDED.—(After plea or finding of guilty.) The Court dismissed the complaint without recording a conviction, in terms of the Probation of Offenders Act, 1907.

W. G., Clerk of Court.

PROBATION ORDER.—The Court, being of opinion that the charge against the accused is proved by his own admission [or by evidence adduced] and being also of opinion that it is expedient to release the accused on probation under the Probation of Offenders Act, 1907, orders that the accused be discharged on entering into his own bond to observe the following conditions of discharge, viz. :—

- (1) To appear for conviction and sentence when called on, at any time within months from this date, under a penalty of £ .
- (2) In the meantime to be of good behaviour.
- (3) To remain during the said period under the supervision of probation officer, and to conform to his directions as to conduct and residence.
- (4) To remain in any employment which he may obtain or which may be found for him unless he has reasonable excuse for leaving the same ; and to perform the duties assigned to him in such employment.

- (5) Not to associate with thieves or other undesirable persons or frequent undesirable places.
- (6) To abstain from intoxicating liquor.

BOND.—I, *A. B.*, do hereby judicially bind and oblige myself in terms of said Act and of the above Order that I will observe and conform to all the conditions set forth in the above Order, which are hereby held as repeated, and of which Order I hereby acknowledge to have received a copy. *A. B.*

OATH OF PROBATION OFFICER ON FAILURE OF ACCUSED TO OBSERVE HIS BOND.—At the day of 192 . In presence of [judge]

Compeared , probation officer within designed, who, being solemnly sworn and examined, depones that the said *A. B.* has failed to observe the conditions of his bond in respect that [set forth shortly particulars as to such failure] . All which is truth as the deponent shall answer to God.

[Signatures of probation officer and judge.]

WARRANT TO SUMMON.—*Eo die.* The Court grants warrant to officers of law to summon the said *A. B.* to appear for conviction and sentence on the within complaint on in the Court.

[Clerk of Court.]

Or,

WARRANT TO APPREHEND.—The Court grants warrant to apprehend the said *A. B.* [Judge.]

SUMMONS BY OFFICER.—*A. B.* [designed]. You are hereby summoned to appear for conviction and sentence on in the Court at for the offence in respect of which you were on placed on probation under bond signed by you on said date, you having failed to observe the conditions of your bond, viz. [set forth shortly the particulars of failure], with certification that in the event of your failing to attend warrant may be issued for your apprehension. [Police Constable.]

[Place and date.] Compeared the said *A. B.* The Court having made inquiry and being satisfied that the said *A. B.* had failed to observe the conditions of his bond found him guilty of the offence in the foregoing complaint and sentenced him [set forth sentence].

The necessary variations may be made on the above forms to meet the special circumstances of any case. If the bond is not written on the complaint the conditions prescribed by the Court will be detailed in it.

NOTES ON SCHEDULE E

Attention is directed to the provisions of the Criminal Justice Administration Act, 1914, the Act of Adjournal of 18th March 1915, and the Forms given in the latter. Imprisonment is not now competent for a period of less than five days, and time must either be allowed for payment of a fine or the fact that time was refused, and the reason must be stated both in the sentence and extract. When time is allowed the period must not be less than seven days. The forms of sentences and extracts have been altered to give effect to these provisions, or notes have been added drawing attention to them.

Attention may also be drawn to the following points as involving perhaps the most important alterations on the old procedure :—

(1) It is no longer necessary for the accused to sign a plea of guilty. His plea is signed either by the judge or Clerk of Court. The plea and sentence may be combined, and when this is done one signature is sufficient to authenticate both (§ 31). This is a very convenient provision, and it is adopted in the forms of procedure of which illustrations are given (*infra*, p. 342).

(2) The minutes of procedure are extremely short, all executive clauses necessary for their execution being either implied or embraced in the extracts, if extract is necessary (§ 53).

(3) Warrants of apprehension and search must be signed by the judge granting the same, but all other warrants and minutes may be signed either by the judge or Clerk of Court (§ 16.) It is suggested that advantage should be taken of the power thus conferred on the Clerk of Court, but it must be kept in view that to enable him to exercise it he should have a written appointment to act as clerk. See *Brown* (1906), 5 *Adam*, 149.

(4) As regards penalties imposed by the Court—

(a) If no period of imprisonment is specified by the judge when imposing a fine and the fine is not paid, the maximum period applicable to the sum imposed will be entered in the record (§ 48).

(b) If the period is accidentally overstated it will be held as being reduced to the maximum competent, and the sentence and extract can, with the authority of the judge, be corrected (§ 48).

(c) A sentence may be modified at any time prior to imprisonment following upon it (§ 54).

(d) A *cumulo* penalty may be imposed where conviction follows on two or more statutory charges (§ 53).

(e) A conviction of part or parts of a charge or charges implies dismissal of the rest of the complaint, and such dismissal is not entered in the record (§ 58).

(5) The forms supplied in the schedule for the procedure relative to bail and caution for good behaviour seem sufficiently complete. The most frequent course in the Summary Court is for a small sum to be consigned in respect of bail or caution, and provision for this, and also generally for the finding, forfeiture, and recovery of caution, will be found in § 50 of the Act. It is suggested that advantage might perhaps be taken more frequently than is at present the case of accepting a bond by a respectable householder instead of insisting on consignment, and the simple form of bond provided by the Act should facilitate this. It has to be kept in view that a cautioner failing to pay the amount due under his bond is liable to imprisonment appropriate to the amount for which he has become responsible.

(6) The forms of extract seem complete in themselves, and do not call for remark.

(7) The forms under the Probation Act contemplate the insertion in the proceedings of a sheet containing minutes applicable to the whole procedure involved in probation. It will be observed, where this form is adopted, that the short form of bond will be signed in presence of the Court, and that no witnesses to the signature of the accused in that event will be required. If a separate bond is taken, it will require to be attested in the usual way.

EXAMPLES OF PROCEDURE

It may perhaps be of service to give some concrete cases to illustrate how the different forms of procedure under the Act might be worked in actual practice. For this purpose there are given—

I.—A complaint applicable to the Sheriff Court against several offenders charged with several offences, in which some of the accused plead guilty and some not guilty, and illustrating a somewhat complicated case.

II.—A complaint applicable to the Justice of the Peace Court for a statutory offence where there is only one accused.

III.—A complaint applicable to the Police Court for a statutory offence where there is only one accused.

IV.—A complaint applicable to juvenile offenders.

V.—Forms of note to be appended to service copy of complaint and form of notice to accused where complaint not served.

VI.—Forms applicable to a case where a Court desires to modify a sentence originally pronounced, or a case in which the period of imprisonment imposed for non-payment of a fine is in excess of that competent under the Act.

VII. Form of Variation or Extension of Probation Order.

VIII. Form of Order sending child to a Reformatory and for payment of maintenance.

IX.—Form of Order sending child to an Industrial School and for payment of maintenance.

X. Form of Order of committal to a Borstal Institution.

In connexion with these forms, attention may be drawn to the following points :—

(1) While the Act provides (§ 16) that the forms of procedure are to be in accordance with the forms contained in the schedules, this is qualified by the words, “or as nearly conform thereto as the circumstances permit,” which leaves a reasonable latitude in regard to minor details. Thus it will be observed that the first minute in schedule E only uses the word “judge.” The word “judge” was, it is understood, inserted in the Act to meet special procedure under the Police Acts of certain of the large cities. If preferred, there is no reason why the word “magistrate” should not be substituted. As regards the Sheriff and Justice of the Peace Courts, it is suggested that the existing practice of setting forth particulars in regard to the presiding judge or judges in these Courts might be adopted. Other minutes of procedure may be supplemented or altered where this conduces to clearness.

I.—COMPLAINT FOR COMMON LAW OFFENCE IN SHERIFF COURT

Under the Summary Jurisdiction (Scotland) Act, 1908

IN THE SHERIFF COURT OF THE LOTHIANS AND PEEBLES AT EDINBURGH

The COMPLAINT of *R. R. W.*, Procurator-Fiscal

A. B., C. D., E. F., G. H., J. K., L. M., presently in custody.

You are charged at the instance of the Complainer that on *5th June 1926*, at the dwelling-house, *Liberton, Midlothian*, occupied by *K. L.*, you did (1) *conduct yourselves in a disorderly manner and commit a breach of the peace.* (2) *You,*

the said *A. B. and C. D.*, did assault the said *K. L.* and strike him with your fists. (3) You, the said *E. F.*, did maliciously break a pane of glass in a window of said house. And you, *A. B. and C. D.*, have been previously convicted as in the List annexed.

List of previous Convictions applying to—

Date.	Place of Trial and Court.	Offence.	Sentence.
1926, 2nd Jan.	(1) You <i>A. B.</i> <i>Edinburgh Police</i>	Assault	£1 or 10 days.
„ 2nd Feb.	(2) You <i>C. D.</i> <i>Edinburgh Police</i>	„	£1. 10s. or 20 days.

R. R. W.,
Procurator-Fiscal.

EDINBURGH, 7th June 1926.—In presence of *R. L.*, Esquire, K.C., Sheriff-Substitute.

PLEA OF GUILTY AND SENTENCE COMBINED

Compeared the Accused *A. B. and C. D.*, and in answer to the Complaint pled guilty and were Fined *A. B.* £2 and *C. D.* £1. 10s., and in default of payment *within seven days from this date, twenty days' imprisonment each.*

W. G.
Clerk of Court.

Compeared the Accused *E. F.*, and in answer to the Complaint pled guilty, and was ordered to find £2 Caution for good behaviour for *six months*, and in default *twenty days' imprisonment.*

W. G.,
Clerk of Court.

PLEA OF NOT GUILTY

Compeared the Accused *G. H.*, *J. K.*, and *L. M.*, and in answer to the Complaint pled not guilty.

W. G.,
Clerk of Court.

MINUTES OF ADJOURNMENT

The Court Adjourned the Diet to 9th June 1926 at 10.30 a.m., and ordered the Accused respectively to be detained in Prison until that date, or until Security for £1 each be found for the appearance of each Accused respectively at all Diets of Court.

W. G.,
Clerk of Court.

MINUTES AT TRIAL

EDINBURGH, 9th June 1926.—In presence of *R. L.*, Esquire, K.C., Sheriff-Substitute.

Compeared the Accused, who adhered to the plea of not guilty previously tendered, and evidence was led.

Finding.

The Court found the Accused guilty as libeled.

SENTENCE OF COURT

G. H. fined 10s., and in default of payment ten days' imprisonment. Time was not allowed for payment in respect that accused failed to satisfy the Court that he has a fixed abode within its jurisdiction.

W. G.,
Clerk of Court.

Admonition

J. K. and L. M. Admonished and Dismissed.

W. G.,
Clerk of Court.

II.—COMPLAINT FOR STATUTORY OFFENCE IN JUSTICE OF THE PEACE COURT

Under the Summary Jurisdiction (Scotland) Act, 1908

IN THE JUSTICE OF THE PEACE COURT FOR THE COUNTY OF FIFE AT CUPAR

The COMPLAINT of *J. K.*, Procurator-Fiscal

A. B., Hotel-keeper, *Hotel*, , *Fife*.

You are charged at the instance of the Complainer that on *Sunday, 13th June 1926*, in your said *Hotel*, you did sell a half gill of whisky to *C. D.*, he not being a lodger in said *Hotel* or a traveller, contrary to your Certificate and the Licensing (Scotland) Act, 1903, § 53, whereby you are liable to the penalties applicable to a first offence set forth in said section.

J. K.,
Procurator-Fiscal.

CUPAR, 17th June 1926.—The Court Assigns 25th June 1926, at 11 a.m., within the ordinary Court Room, Cupar, as a Diet in this case. *R. O. P.*

Clerk of Court.

CUPAR, 25th June 1926.—In presence of *C. D. and E. F.*, Justices of the Peace for the County of Fife.

The Agent for the Accused stated the following objections to the relevancy of the complaint, viz. [*set forth objections*].

Having heard the Prosecutor in reply to said objections the Court repelled them.

R. O. P.,
Clerk of Court.

PLEA OF NOT GUILTY

Compeared the Accused, and in answer to the Complaint pled not guilty.

R. O. P.,
Clerk of Court.

MINUTES OF ADJOURNMENT

The Court adjourned the Diet to 1st July 1926, at 11 a.m., and Ordained the Accused then to appear.

R. O. P.,
Clerk of Court.

MINUTES AT TRIAL

CUPAR, 1st July 1926.—In presence of *the said C. D. and E. F.*, Justices of the Peace.

Compeared the Accused, who adhered to the plea of not guilty previously tendered, and evidence was led.

The following witnesses were examined for the prosecution, viz. :—

1. *D. C.*
2. *F. E.*
3. *G. H.*

and the following witnesses for the defence :—

1. *The Accused.*
2. *M. L.*

In the course of the examination of the said *D. C.*, the Prosecutor put to him the following question [*set forth question*]. *The Agent for the Accused* objected to said question on the ground [*specify*].

Having heard the *Prosecutor* in reply to said objection, the Court *repelled it*.

R. O. P.,
Clerk of Court.

The following documents were produced in evidence by the Prosecutor, and are numbered with reference hereto, viz. :—

- 1.
- 2.

and the following documents were produced in evidence for the defence, and are numbered with reference hereto, viz. :—

- 1*a.*
- 2*a.*

The Court found the Accused guilty *as libelled*.

SENTENCE OF COURT

Fined £3 (*including 30s. expenses*), *which fine was paid at the Bar.*

R. O. P., Clerk of Court.

III.—COMPLAINT FOR STATUTORY OFFENCE IN BURGH POLICE COURT

Under the Summary Jurisdiction (Scotland) Act, 1908

IN THE POLICE COURT OF THE BURGH OF ANSTRUTHER-WESTER

The COMPLAINT of *W. H.*, Burgh Prosecutor

A. B., residing at

You are charged at the instance of the Complainer that on 5th June 1926, in *High Street, in the Burgh of Anstruther-Wester*, you did behave in a riotous, violent, and indecent manner, contrary to the *Burgh Police (Scotland) Act, 1892*, § 380, subsection 9, whereby you are liable to a penalty not exceeding 40s., and in default of payment to imprisonment in terms of § 48 of the *Summary Jurisdiction (Scotland) Act, 1908*.

W. H.,
Burgh Prosecutor.

ANSTRUTHER-WESTER, 11th June 1926.—In presence of *C. D.*, Magistrate.

PLEA OF GUILTY AND SENTENCE COMBINED

Compeared the Accused, and in answer to the Complaint pled guilty, and was Fined 5s., and in default of payment within *seven* days from this date *five* days' imprisonment.

C. H. M.,
Clerk of Court.

IV.—COMPLAINT FOR COMMON LAW OFFENCE: JUVENILE OFFENDERS

Under the Summary Jurisdiction (Scotland) Act, 1908

IN THE SHERIFF COURT OF FIFE AND KINROSS AT CUPAR

The COMPLAINT of H. B., Procurator-Fiscal

A. B., C. D., E. F., G. H.

You are charged at the instance of the Complainer that on *5th June* 1926, at the *Farm of Todhall, in the Parish of Dairsie, Fife*, you did maliciously knock down 22 yards of the coping of a wall forming the fence between two fields on said farm.

H. B.,
Procurator-Fiscal.

CUPAR, *12th June* 1926.—In presence of S. D., Esquire, Sheriff-Substitute.

Compeared the Accused, and in answer to the Complaint pled guilty, and were sentenced to receive A. B. and C. D. each six stripes and E. F. and G. H. each three stripes with the birch-rod, in presence of C. E. D., Surgeon, or, in the event of said Surgeon certifying that the Accused or any of them were unfit to undergo such punishment, Ordained the said Accused so certified to be again brought to the Bar for further orders of the Court.

W. C.,
Clerk of Court.

V.—FORMS OF NOTE TO BE APPENDED TO SERVICE COPY OF COMPLAINT, AND FORM OF NOTICE FOR SERVICE ON ACCUSED WHERE COMPLAINT NOT SERVED

1. ALTERNATIVE FORM OF NOTE TO BE APPENDED TO SERVICE COPY OF COMPLAINT

CITATION

A. B., within designed, you are hereby summoned to appear personally on *11th June* 1926, at 10.30 a.m., within the Sheriff Court-House, Edinburgh, to answer to the Complaint against you, of which the foregoing is a copy.

Served by me on *3rd June* 1926.

C. D.,
Police Constable.

NOTE

If on *11th June* 1926 you plead not guilty to the within charge, your case will be adjourned to a Diet to be then fixed by the Court.

C. D.,
Police Constable.

Or,

NOTE

If you plead not guilty to the within charge your case will proceed to trial on 11th June 1926, unless the Court grants an adjournment.

If you desire to have Witnesses cited for the Defence, the Police will give you all reasonable assistance to cite them.

If you intend to plead guilty to the charge you are requested to intimate this to me on or before 7th June 1926.

C. D.,

Police Constable.

Note.—It is suggested that both forms of note might be appended to service copy complaint, the one appropriate to the particular case being filled up, and the other deleted.

2. FORM OF NOTICE TO ACCUSED WHERE COMPLAINT NOT SERVED

To A. B., . With reference to the charge of *Breach of the Peace* against you, you are requested to attend the Sheriff Court, Edinburgh, on 11th June 1926, at 10.30 a.m., to answer to said charge.

C. D.,

Police Constable.

If you intend to plead not guilty to the charge, you need not attend on that date.

Note.—This form may be varied to meet different circumstances.

VI.—FORMS APPLICABLE TO MODIFICATION OF ORIGINAL SENTENCE

1. WHERE THE COURT DESIRES TO MODIFY SENTENCE (§ 53)

[Place and date.] *Compeared the said A. B.*

The Court, in view of circumstances relative to the case of the said A. B. which have been brought under the notice of the Court since the above sentence on him was pronounced, and being satisfied that it is expedient that said sentence should be modified, directed the Clerk of Court to cancel the minute of said sentence, and in lieu thereof pronounced the following sentence, viz. : [set forth sentence].

Note.—This minute should be signed by the judge instead of by the Clerk of Court. It is only competent to modify a sentence prior to imprisonment having followed upon it.

2. WHERE THE PERIOD OF IMPRISONMENT IMPOSED FOR NON-PAYMENT OF A FINE IS IN EXCESS OF THAT COMPETENT UNDER § 48 OF THE ACT

[Place and date.] *The Court, in view of the fact that the above sentence pronounced on A. B. by which he was fined £2, and in default of payment thirty days' imprisonment, and under which he is at present undergoing incarceration in*

Prison, is quoad the period of imprisonment in excess of the sentence competent under § 48 of the Summary Jurisdiction (Scotland) Act, 1908, and that said sentence falls in terms of said section to be reduced to the maximum period competent in default of payment of said fine, viz. to twenty days, the Court authorised the Clerk of Court to make the necessary correction on the original minute of said sentence and to issue a fresh extract applicable to the sentence as corrected.

Note.—This minute should be signed by the judge.

VII.—VARIATION OR EXTENSION OF PROBATION ORDER

Under the Summary Jurisdiction (Scotland) Act, 1908, the Probation of Offenders Act, 1907, and the Criminal Justice Administration Act, 1914

IN THE SHERIFF COURT OF THE LOTHIANS AND PEEBLES AT EDINBURGH

Name of Accused.—*B. M.*

Offence Charged.—Contravention of the Children Act, 1908, § 12.

Date of Original Probation Order.—*27th February 1926.*

EDINBURGH, *27th August 1926.*—In presence of *A. D., Esquire*, Sheriff-Substitute.

Compeared the Accused, *B. M., Mr H. W.*, Procurator-Fiscal of Midlothian, and *Miss M. D.*, Probation Officer.

The Court, on the application of said Probation Officer, and having heard her as to the conduct of the accused, *B. M.*, since the Probation Order regarding her was pronounced on *27th February 1926*, and having also heard the Procurator-Fiscal and said Accused, and in respect it appears to the Court that it is expedient that the terms of said Probation Order should be varied to the effect of extending the period of same, and in respect that said Accused has failed to show any cause why such variation should not be made, varies the said Probation Order dated *27th February 1926* to the effect that it shall be extended and remain in force with all its terms and conditions for the further period of six months from this date, and to the same effect as if the period of twelve months had been inserted in the same instead of six months.

A. D.,
Sheriff-Substitute.

VIII.—ORDER SENDING CHILD TO REFORMATORY AND FOR PAYMENT OF MAINTENANCE

Under the Children Act, 1908, and the Summary Jurisdiction (Scotland) Act, 1908

ORDER IN THE COMPLAINT AT THE INSTANCE OF *A. B.*, PROCURATOR-FISCAL OF COURT AGAINST *C. D.* (DESIGN)

EDINBURGH [*date*].—The Court, in respect that the accused [*name*], who is twelve years of age, or upwards, but less than sixteen years of age (having been born, so far as has been ascertained on [*date*]), and who resides in the District of , has been convicted of the offence of which is punishable in the case of an adult with penal servitude or imprisonment, in pursuance of the Children Act, 1908, orders the said Accused, whose religious persuasion appears to be to be sent to the Certified Reformatory School at (the Managers whereof are willing to receive him) and to be there detained [*state period*]; and for the purpose foresaid grants warrant to all concerned, and orders [*name and address*] the of the said Accused and who is liable to maintain the accused to

pay to the Scottish Education Department for the maintenance of the said Accused in the said Certified Reformatory School, the sum of weekly and every week during the whole of the time for which the said Accused is liable to be detained therein, and grants warrant as accords of law.

X. Y.,
Sheriff-Substitute.

IX.—ORDER SENDING CHILD TO AN INDUSTRIAL SCHOOL AND FOR PAYMENT OF MAINTENANCE

Under the Children Act, 1908, and the Summary Jurisdiction (Scotland) Act, 1908

ORDER IN THE COMPLAINT AT THE INSTANCE OF A. B., PROCURATOR-FISCAL OF COURT OF MIDLOTHIAN

EDINBURGH [date].—The Court in respect that W. W. [designation and address], father of [name], a child apparently under the age of fourteen years (having been born so far as has been ascertained on [date]), has been convicted of [crime or offence], that the said child appears to have resided in the district of the Education Authority of Midlothian and that his religious persuasion appears to be , orders said child to be sent under the provisions of the Children Acts, 1908 to 1921, particularly [state section and subsection] of the Children Act, 1908, to the Certified Industrial School at , in the County of (the Managers whereof are willing to receive him), and therein to be detained [state period], and for these purposes grants warrant to all concerned; and orders the said W. W., parent of said child, to pay to the Scottish Education Department for the maintenance of the said child, the sum of weekly, and every week, during the whole of the time for which the said child is liable to be detained in the said School; and grants warrant as accords of law.

R. L.

X.—ORDER OF COMMITTAL TO A BORSTAL INSTITUTION

Under the Summary Jurisdiction (Scotland) Act, 1908, the Prevention of Crimes Act, 1908, and the Criminal Justice Administration Act, 1914

EDINBURGH [date].—In presence of X. Y., Sheriff-Substitute.

Compared the Accused, and in answer to the complaint pled guilty. The Court, in respect that the Accused, A. B., is not less than sixteen nor more than twenty-one years of age (having been born, so far as has been ascertained, on [date]), and that it appears to the Court that by reason of the Accused's criminal habits or tendencies it is expedient that he should be subject to detention under such instruction and discipline as appears most conducive to his reformation and the repression of crime, sentenced the Accused to be detained under penal discipline in the Borstal Institution at Polmont for a term of three years from this date, and meantime granted warrant to officers of law to convey the Accused to the Prison of Edinburgh, therein to be detained until he is removed to said Institution.

X. Y.,
Sheriff-Substitute.

SCHEDULE F

Sections 16, 17

INCIDENTAL APPLICATION

Under the Summary Jurisdiction (Scotland) Act, 1908

In the

Court at

The Petition of

HUMBLY SHEWETH—

That [*state the circumstances and the statute or statutes, if any, on which the application is based*].

The petitioner therefore craves the Court [*set forth warrant or order desired*].
According to Justice, etc.

EXAMPLES OF CRAVES FOR WARRANTS AND ORDERS OF COURT

(a) To grant warrant to officers of law to search the premises at occupied by _____ for the stolen property mentioned in the petition [*or, as the case may be*] and to take possession thereof and convey it to _____.

(b) To seize and destroy the carcass referred to in the petition.

(c) To order the property mentioned in the petition to be restored to the petitioner on proof thereof being given that such property was stolen and that the petitioner is the true owner or possessor thereof.

(d) To remit the accused to the Sheriff of _____ [*place*] [*or as the case may be*], and meantime to grant warrant to convey him to the prison [*or police cells*] of _____ [*place*], thereafter to be dealt with in due course of law.

FORM OF WARRANT OR ORDER TO BE WRITTEN ON SUCH PETITION

[*Place and date.*] The Court having considered the foregoing petition grants warrant as craved.

NOTES ON SCHEDULE F

This form will be useful in many cases; *e.g.*, it may be utilised in applications for warrant to commit to an industrial school, where the accused is not brought before the Court on a criminal charge.

The case for which it will probably be most generally utilised is where a remit is made to a higher Court. In such a case, the narrative on which the application is based might be set forth thus:—“That *A. B.* has been apprehended within the burgh of _____ charged with the crime of _____, which is an offence beyond the jurisdiction of this Court, and it is necessary that he should be remitted to the Sheriff of _____, and that meantime he should be committed to prison [*or to the police cells of* _____].”

Where there are several accused the form might be shortened by the use of a schedule, in which case the narrative would run thus:—“That the persons whose names are set forth in the schedule annexed hereto have been apprehended within the burgh of _____, charged with the crimes respectively applicable to each of them as set forth in said schedule, which are offences beyond the jurisdiction of this Court, and it is necessary that the accused should be remitted to the Sheriff of _____, and that meantime they should be committed to prison [*or police cells as the case may be*].”

SCHEDULE H

Sections 16, 64, 70

FORMS OF PROCEDURE IN APPEALS

Stated Case

In the Court of held at
Case for the opinion of the High Court of Justiciary at Edinburgh.

In causa *A. B. v. C. D.*

This is a cause [*here state concisely and without argument the nature of the cause and the facts if any admitted or proved in evidence, any objections to the admission or rejection of evidence taken in the proof, the grounds of the decision, and any other matters necessary to be stated for the information of the superior court*].

The question submitted for the opinion of the Court is :—
[*Here state the question or questions seriatim, for the opinion of the Court.*]

This case is stated by me [*or us*].

[*Signature of the Inferior Judge, or preses if more than two Judges.*]

MINUTES OF PROCEDURE

EDINBURGH, *January* 192 .—The said *A. B.* craves the Court
to state a case for the opinion of the High Court of Justiciary.

A. B.,

or *E. F.*, Agent for the said *A. B.*

Eo die the Court fixes £ as the sum to be consigned by said appellant,
and grants interim liberation without further caution.

Eo die £ consigned.

January 192 .—Draft case sent to appellant and duplicate thereof
to respondent.

February 192 .—Case returned adjusted by parties.

February 192 .—Case signed and sent to appellant and complaint
and productions transmitted to Clerk of Justiciary.

Where Prosecutor consents to Conviction being set aside

January 192 .—The prosecutor consents to the conviction in this
case being set aside by the High Court in respect [*set forth grounds on which
consent given*].

[*To be signed by the prosecutor or his agent.*]

January 192 .—The appellant intimated that he did not desire to be
heard with reference to the above minute by the prosecutor.

Eo die case transmitted to Clerk of Justiciary.

*The above Minutes of Procedure will, except where otherwise stated, be signed
by the Clerk of the Court.*

NOTES ON SCHEDULE H

The facts of each prosecution vary so much that it is difficult to illustrate the best method of stating a case. One point, however, must be kept constantly in view, viz., that it is not the statements of the witnesses which are to be set forth, but the facts which the Court has found proved. The legal points raised by these facts, on which it is desired to obtain the opinion of the High Court, should be clearly and succinctly stated. It may perhaps be of some little assistance in framing a case, to those who have not previously had much experience in this, if an outline of a case is given. The case, part of which has been adapted for this purpose, is that of *Kessack* (1905), 4 Adam, 557, in which a publican was convicted of a breach of his certificate by being found in a state of intoxication on his own licensed premises after they had been closed for business.

After the formal heading as prescribed in the statutory form, the case will proceed thus :—

This is a cause brought under the Summary Jurisdiction (Scotland) Act, 1908, at the instance of the respondent against the appellant, charging him with a contravention of the Licensing (Scotland) Act, 1903, § 53, and of the certificate which he holds for the public-house at No. _____ Street, Edinburgh, in respect that on _____ in his said premises at _____ he was found in a state of intoxication.

The Complaint was called in Court before me on _____, when before pleading counsel for the Accused stated the following objections to the relevancy of the complaint, viz. : (1) _____ ; (2) _____ ; (3) _____. Having heard the respondent in reply to said objections, I repelled them. The appellant then pleaded not guilty, and the case was adjourned to _____, on which date it went to trial. The following facts were proved :—

1. That the appellant was the holder of a public-house certificate, in the form prescribed by the Licensing (Scotland) Act, 1903, for the premises referred to in the complaint, for the current year ending 15th May next.
2. That on the date libelled the appellant closed his premises at 10 P.M., being the hour fixed by the Magistrates for the closing of public-houses in Edinburgh.
3. That after the premises had been closed *R. S.*, a personal friend of the appellant's, remained behind in said premises with him and partook of his hospitality.
4. That about midnight the premises were entered by the police, who found the appellant and the said *R. S.* there, the appellant being in a state of intoxication.
5. That no contravention of the appellant's certificate took place during the time when his premises were, in terms of his certificate, open for business.

I convicted the appellant and fined him £ _____, which fine was paid at the bar.

In the course of the trial *A. B.*, a witness for the prosecution, was called by the respondent and the following question put to him, viz.,
 . Counsel for the appellant objected to the competency of said

question on the ground that . I repelled the objection, and in answer to said question the witness said that .

The Questions submitted for the opinion of the High Court are :—

1. Was I right in repelling the objections to the relevancy of the complaint ?
2. Was I right in repelling the objection to the competency of the question above mentioned put to the witness *A. B.* ?
3. Did the fact that the appellant was found in a state of intoxication in his licensed premises after the hour when said premises were closed for business infer a breach of his certificate, in view of the fact that no contravention of the Licensing Act occurred during the time when the premises were open for business ?

This case is stated by me.

[*Signature of Judge.*]

FORM OF CERTIFICATE UNDER § 67

[*Place and date.*] As Agent for the said *A. B.*, I hereby certify that on this date intimation of the within-stated case was made to *C. D.*, the respondent, by a copy thereof being sent to him by registered post letter [*or as the case may be*]. [Signed] *E. F.* [*designation*].

This certificate to be written on the stated case.

APPEAL TO CIRCUIT COURT

(1) MINUTE OF APPEAL

[*Place*], 23rd February 1926.—I appeal in open Court against the foregoing judgment to the next Circuit Court of the High Court of Justiciary to be held at , and that for reasons to be stated at the Bar of the said Circuit Court.

E. F., Solicitor, [*Place*],
Pror. for *G. H.*, Appellant.

(2) APPEAL

UNTO THE RIGHT HONOURABLE THE LORD JUSTICE-GENERAL, LORD JUSTICE-CLERK, AND LORDS COMMISSIONERS OF JUSTICIARY, or such of their Lordships as may be the judges at the next Circuit Court of the High Court of Justiciary to be held at .

The APPEAL of *G. H.* [*designation*],—Appellant ;

Against

J. K., Solicitor, , Procurator-Fiscal of the Justice of Peace Court
for shire, for the public interest,—Respondent ;

HUMBLY SHEWETH,—

That the Respondent instituted a prosecution against the Appellant, in the Justice of Peace Court for shire at , by a Complaint dated 18th February 1926, in which Complaint he alleged that the Appellant [*repeat charge as in Complaint*] ;

That in said prosecution, after sundry steps of procedure, including the taking of proof for both parties, the presiding Justices, on 23rd February 1926, were pleased to pronounce the following judgment [*repeat judgment*] ;

That the Appellant conceives himself aggrieved by the judgment above copied, and complains and seeks relief against the same by appeal to the next Circuit Court of the High Court of Justiciary to be held at _____, and that for the following reasons among others to be stated at the Bar of the said Circuit Court, namely [*here state grounds of appeal*].

May it therefore please your Lordships to recall the judgment appealed against; to annul and discharge *in toto* the conviction recorded against the Appellant; to ordain repayment to the Appellant of the penalty and expenses paid by him; and to find the Appellant entitled to expenses; or to do otherwise in the premises as to your Lordships shall seem just.

According to Justice, etc.,

E. F., Solicitor, [*Place*],
Pror. for G. H., Appellant.

(3) CERTIFICATE

[*Place*], 23rd February 1926.—I hereby certify that the foregoing Appeal was taken and entered in open Court, at the time of pronouncing the judgment appealed against, and caution found, all in terms of the Statute.

L. M.,
Clerk of Peace.

(4) ACCEPTANCE OF SERVICE

[*Place*], 2nd March 1926.—I accept service on behalf of the Respondent.

N. O., Solicitor, [*Place*],
Pror. for Respondent.

SUSPENSION

(1) BILL OF SUSPENSION

UNTO THE RIGHT HONOURABLE THE LORD JUSTICE-GENERAL, LORD JUSTICE-CLERK, AND LORDS COMMISSIONERS OF JUSTICIARY

BILL OF SUSPENSION AND LIBERATION for A. B., presently Prisoner
in the Prison of _____, —Complainer;
Against _____

The Right Honourable C. D., the Lord Advocate,—Respondent;

HUMBLY SHEWETH,—

That, of this date [*on margin*, 3rd February 1926], sentence was pronounced by the Sheriff-Substitute of _____, at _____, upon Complainer under a criminal libel at the instance of the said Respondent, the Lord Advocate, for the public interest, against the Complainer, whereby the said Sheriff adjudged the Complainer to be imprisoned for the period of four calendar months from the said date, and thereafter set at liberty; and granted warrant to all concerned accordingly, most wrongously and unjustly, as will appear to your Lordships from the annexed statement of facts and Note of Pleas in Law;

That the Complainer feels aggrieved by the said sentence, and is under

the necessity of applying to your Lordships for suspension of the same, and for liberation.

May it therefore please your Lordships to *simpliciter* suspend the said sentence and whole grounds and warrants thereof, and all that has followed thereon; and also to grant warrant charging the keeper of the prison of _____ to set the Complainer at liberty; and further, to grant warrant ordaining the Sheriff Clerk at _____, or other custodier of the proceedings at the instance of the Respondent against the Complainer, to transmit the same to the Clerk of Justiciary; and to find the Complainer entitled to expenses; or to do otherwise in the premises as to your Lordships shall seem proper.

According to justice, etc.,

E. F.

Statement of Facts for Complainer

(Here follow in numbered articles averments of those facts upon which the Complainer intends to found his pleas in law.)

Pleas in Law for Complainer

(Here follow the pleas upon which the Complainer founds his crave to have the proceedings set aside.)

(2) INTERLOCUTOR FOR SERVICE, ETC.

EDINBURGH, 23rd February 1926.—The Lord X., having considered the foregoing Bill, Grants Warrant for serving a copy thereof and of this deliverance on the therein-named the Lord Advocate, Respondent; and further grants warrant for, and ordains transmission of the proceedings complained of to the Clerk of Justiciary; and appoints the case to be heard on the _____ day of _____ X.

Note.—It is usual to print the Bill, Statement of Facts, Pleas in Law, and Interlocutors, with an appendix containing a copy of the Indictment and record of proceedings thereunder, and of any important documentary productions upon which it is intended to found.

APPEAL TO QUARTER SESSIONS

(1) APPEAL

[Place], 23rd February 1926.

UNTO THE HONOURABLE HIS MAJESTY'S JUSTICES OF THE PEACE
FOR _____ SHIRE in Quarter Sessions assembled.

The APPEAL of A. B. [*designation*],—Appellant
Against

C. D. [*designation*], Procurator-Fiscal of the Justice of Peace Court
for _____ shire, for the public interest,—Respondent;

HUMBLY SHEWETH,—

That the Respondent instituted a prosecution against the Appellant in the Justice of Peace Court for _____ shire, by a Complaint

dated 3rd February 1926, in which Complaint he alleged that the Appellant [*repeat charge as in Complaint*];

That at a Court of His Majesty's Justices of the Peace for shire, held at on 10th February 1926, E. F. and G. H., Esquires, two of His Majesty's Justices of the Peace for shire, were pleased to pronounce the following judgment [*repeat judgment*];

That the Appellant conceives himself aggrieved by the judgment above copied, and complains and seeks relief against the same by appeal therefrom to the next Quarter Sessions of the Peace for shire.

May it therefore please your Honours to recall the judgment appealed from; to annul and discharge *in toto* the conviction recorded against the Appellant; to ordain repayment to the Appellant of the penalty and expenses paid by him; and to find the Appellant entitled to expenses; or to do otherwise in the premises as to your Honours shall seem just.

According to Justice, etc.,

A. B.

ADVOCATION

(1) BILL OF ADVOCATION

UNTO THE RIGHT HONOURABLE THE LORD JUSTICE-GENERAL, LORD JUSTICE-CLERK, AND LORDS COMMISSIONERS OF JUSTICIARY

BILL OF ADVOCATION for A. B., Procurator-Fiscal of shire,
at ,—Complainer;
Against

C. D. [*designation*],—Respondent;

HUMBLY SHEWETH,—

That of this date [*on margin*, 3rd February 1926] a pretended interlocutor or judgment was pronounced by E. F., Esquire, Sheriff-Substitute of , at , upon a complaint at the instance of the Complainer, as Procurator-Fiscal of Court, for the public interest, charging the Respondent as therein set forth with [*state charge*], whereby the said Sheriff-Substitute dismissed the said complaint erroneously and contrary to law, as will appear to your Lordships from the annexed Statement of Facts and Note of Pleas in Law;

That the Complainer is under the necessity of complaining to your Lordships of the said pretended interlocutor or judgment.

Wherefore the Complainer prays your Lordships for Letters of Advocation in the premises at his instance in common form; and in the meantime to grant warrant to the Clerk of the Sheriff Court at , or other custodier of the proceedings at the instance of the Complainer against the Respondent, and interlocutors following thereon, to transmit the same to the Clerk of Justiciary; and on consideration of the said proceedings to advocate the same, to recall the interlocutor or judgment complained of, to remit to the Sheriff of the counties of , or his Substitute at , to proceed with the said complaint according to law, and to find the Complainer entitled to expenses; or to do further or otherwise in the premises as to your Lordships shall seem proper.

According to Justice,

F. G.

Statement of Facts for Complainer

(Here follow in numbered articles averments of those facts upon which the Complainer intends to found his pleas in law.)

Pleas in Law for Complainer

(Here follow the pleas upon which the Complainer founds his crave to have the proceedings advocated.)

(2) INTERLOCUTOR FOR SERVICE

EDINBURGH, 23rd February 1926.—The Lord X. having considered the foregoing Bill, grants warrant for serving a copy thereof and of this deliverance on the therein-named C. D., Respondent; and further grants warrant for and ordains transmission of the proceedings complained of to the Clerk of Justiciary; and appoints the case to be heard on the day of X.

SCHEDULE G

§§ 16, 52, 74

TABLE OF FEES

I.—*To the Procurator-Fiscal or qualified Law Agent acting for a Prosecutor other than the Public Prosecutor of a Court.*

Framing the complaint and whole proceedings prior to trial	£	s.	d.
Each copy of complaint for service.	0	7	6
Attending a trial—			
If plea of guilty.	0	5	0
If proof led	0	7	6
If case adjourned for second diet	0	5	0

II.—*Court or Clerk's Dues.**

For each complaint	0	2	6
For whole proceedings at trial—			
If plea of guilty.	0	2	6
If proof led	0	5	0
Extract of any judgment, conviction, or order	0	1	0
Fee for preparing stated case	1	10	0

To the bar officer for whole proceedings—	£	s.	d.
If plea of guilty.	0	0	6
If proof led	0	1	0

III.—*Officer's Fees.*

For serving each complaint and returning execution.	0	1	6
For citing each witness	0	0	6
For apprehending a respondent or witness	0	2	6
For each hour the prisoner is necessarily in the custody of the officer beyond the first	0	1	0

In any case where a concurrent or assistant is required he will be allowed a sum equal to two-thirds of the fee payable to the officer for the same business.

In addition, necessary travelling expenses to be paid.

IV.—*Witnesses*

Such reasonable fees and expenses as may be sanctioned by the Court.

* These fees do not apply to Sheriff Court proceedings regulated by Act of Sederunt.

Note.—In the Sheriff Court a single fee of 10s. is now chargeable on lodging a complaint as Court or Clerk's dues, to cover all proceedings, including Extract but not including Stated Case. Act of Sederunt, 22nd February 1922.

APPENDIX III

ACT OF ADJOURNAL

RELATIVE TO

CRIMINAL JUSTICE ADMINISTRATION ACT, 1914

*At Edinburgh, the Eighteenth day of March, One thousand
nine hundred and fifteen*

Present :—

THE RIGHT HONOURABLE THE LORD JUSTICE-GENERAL.
THE RIGHT HONOURABLE THE LORD JUSTICE-CLERK.
THE HONOURABLE LORD DUNDAS.
THE HONOURABLE LORD MACKENZIE.
THE HONOURABLE LORD GUTHRIE.

The Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary, in pursuance of the powers conferred upon them by § 42 (12) of the Criminal Justice Administration Act, 1914, DO HEREBY ENACT AND DECLARE :—

- I. That the application of an accused person for an allowance of further time for payment of a fine adjudged to be paid by such accused shall be made to the Court of Summary Jurisdiction which adjudged the fine to be paid, and the said Court shall not allow further time for payment unless (1) the application is made within the time originally allowed for payment, and (2) the Court is satisfied that the accused has been and will be unable to pay within the time allowed through unforeseen circumstances, and has a reasonable prospect of being able to pay if further time is allowed.
- II. A person appointed by a Court of Summary Jurisdiction, under § 42 (2) (c) of the foresaid Act, to have supervision of an accused who is between sixteen and twenty-one years of age, and who has been allowed time for payment of a fine, shall advise him with a view to secure the payment of the same and shall report to the Court, immediately on the expiry of the time within which the fine is adjudged to be paid, as to the accused's conduct and means.

III. When a Court of Summary Jurisdiction considers that the money found on an accused on apprehension or after he has been searched by Order of the Court, should not be applied towards payment of the sum adjudged to be paid by said accused, the Court shall make a direction in writing to that effect which shall be written on the extract of the sentence before the same is issued by the Clerk of Court. In regard to any sum of money which may be found on his person when taken to prison—

(a) The accused may make an application to the said Court either verbally or in writing through the Governor of the prison in whose custody he may be at the time, that the said sum of money should not be applied in payment of the fine adjudged to be paid by him.

(b) A person alleging that the money found on the person of an accused is not the property of the accused, but belongs to him, may apply to the said Court for a direction that the money should not be applied in payment of the fine adjudged to be paid, and the Court on enquiry may so direct.

(c) The Magistrate may order the attendance in Court of an accused who has been sentenced and is in prison for the purpose of ascertaining the ownership of the money found on the accused, and a notice to the Governor of the prison signed by a Magistrate of a Court of Summary Jurisdiction will be a sufficient warrant to the Governor of the said prison for conveying the accused to the Court.

IV. In all cases where time is not allowed for payment by a Court of Summary Jurisdiction the reasons of the Court for not so allowing time shall be set forth in the extract of the finding and sentence as well as in the finding and sentence itself.

V. The forms in Schedule A. annexed hereto shall be in supplement of the forms contained in Schedules E. and F. annexed to the Summary Jurisdiction (Scotland) Act, 1908, and the Second Schedule annexed to the foresaid Criminal Justice Administration Act, 1914, and may be used with such variations as circumstances may require for the purposes of the foresaid Criminal Justice Administration Act, 1914.

VI. This Act of Adjournment shall come into operation on the First day of April 1915, and in order that due notice thereof may be given it shall be forthwith printed and published in His Majesty's *Edinburgh Gazette*.

STRATHCLYDE, *I.P.D.*

SCHEDULE A

Sec. 4 (1). DIRECTION OF COURT AS TO MONEY FOUND ON ACCUSED

The Court directed that the money found on the person of an accused should not be applied to payment of the fine.

Sec. 12. ORDER OF DETENTION IN PRECINCTS OF COURT

The Court ordered the accused to be detained within the precincts of the Court until o'clock P.M. of this day.

Sec. 13 (2). ORDER FOR DETENTION IN POLICE CUSTODY NOT EXCEEDING FOUR DAYS, INSTEAD OF IMPRISONMENT

The Court ordered the accused to be detained in the custody of the Police, at (state place) for the space of (state time).

Sec. 42 (2) (a). FORM OF SENTENCE OF FINE OR IMPRISONMENT WHERE TIME IS ALLOWED FOR PAYMENT OF FINE

Fined £ , and in default of payment within days from this date, days' imprisonment.

Sec. 42 (3). ORDER FOR EXTENSION OF TIME FOR PAYMENT OF FINE

The Court having considered the application of the accused for extension of time for payment of the foregoing fine allowed payment to be made within days from this date.

Sec. 42 (2) (a) and (d). SENTENCE OF FINE AND IMPRISONMENT WHERE TIME IS NOT ALLOWED FOR PAYMENT

Fined £ (or £ each), and in default of immediate payment, days' imprisonment (or days' imprisonment each).

Time was not allowed for payment in respect. (Here state reason or reasons.)

Sec. 42 (2) (c). SENTENCE OF FINE AND IMPRISONMENT AND ORDER OF SUPERVISION PENDING PAYMENT OF FINE, IN CASE OF PERSON BETWEEN 16 AND 21 YEARS OF AGE.

Fined £ and in default of payment within days from this date, days' imprisonment.
The Court ordered that the accused be placed under the supervision of A. B. (Name and Designation) during the above period.

NOTICE, UNDER SECTION III (c) HEREOF, TO THE GOVERNOR
OF A PRISON WHEN THE ACCUSED IS IN CUSTODY

TO the Governor of the Prison of

Take notice that the attendance of A. B. presently
in your custody, is required at on
at o'clock.

(Signed by Magistrate.)

STRATHCLYDE, *I.P.D.*

ACT OF ADJOURNAL

FOR REGULATING THE PROCEDURE IN SCOTLAND UNDER THE ALIENS
RESTRICTION ACTS, 1914 AND 1919 (4 & 5 GEO. V. CAP. 12,
AND 9 & 10 GEO. V. CAP. 92), AND THE ALIENS ORDER, 1920.

*At Edinburgh, the Twenty-first day of July Nineteen
hundred and twenty*

Present :—

THE RIGHT HONOURABLE THE LORD JUSTICE-GENERAL.

THE RIGHT HONOURABLE THE LORD JUSTICE-CLERK.

THE HONOURABLE LORD SKERRINGTON.

THE HONOURABLE LORD ORMIDALE.

The Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary, CONSIDERING that by the provisions of the Aliens Restriction Acts, 1914 and 1919, and of the Aliens Order, 1920, made under the powers contained in the said Acts, and in particular by the provisions of §§ 12 (6) (b) and 23 (1) of the said Order, it is lawful for the High Court of Justiciary on the application of the Lord Advocate to make Rules necessary to give effect to the provisions of the said Order in accordance with the provisions of the Summary Jurisdiction (Scotland) Act, 1908 § 16, and considering that an application has been made by the Lord Advocate to the Court to make such rules, and that it is expedient to provide forms of certificates required under §§ 12 (6) (a) and (b), and 12 (7), and for the form of proceedings under

SCHEDULE

Name
Nationality
Age
Dependents (if any)
Offence
Sentence
Prison to which committed
Parish and County, or Burgh, in which
offence committed

(Signature of Judge or Judges.)

(2) Certificate of Conviction, and recommendation for a Deportation Order, by a Court to which an Alien has been remitted, or to which the case against him has been certified, for sentence.

(§ 12 (6) (a))

In the Court of held
at on the day of
nineteen hundred and
Before

I (*or We*) hereby certify that A. B., to whom the particulars in the annexed Schedule relate, having been convicted before the Court of held at on the day of nineteen hundred and of the offence shown in the said Schedule, being an offence specified in § 12 (6) (a) of, and in the Third Schedule to The Aliens Order, 1920, and having been found by the said Court to be an Alien, and the case against him having been (remitted) *or* (certified) to this Court for sentence, the said A. B. was of this date sentenced by the Court (to be committed to one of His Majesty's prisons to be detained there for the space of [or *otherwise as the case may be*]).

And that the Court recommend that a Deportation Order should be made in the case of the said A. B. (in addition to the said sentence) *or* (in lieu of sentence).

(Signature of Judge or Judges.)

SCHEDULE

(As in Form No. (1) hereof)

- (3) Certificate of Conviction and recommendation for a Deportation Order where a conviction, with or without such recommendation, has been pronounced in a Court of First Instance and affirmed on Appeal.

(§ 12 (6) (a))

In the _____ Court of _____ held at
 _____ on the _____ day of _____
 nineteen hundred and _____
 Before _____

I (or We) hereby certify that A. B., to whom the particulars shown in the annexed Schedule relate, having been found to be an Alien, was on the _____ day of _____ nineteen hundred and _____ convicted before the Court of _____ held at _____ of the offence shown in the said Schedule, being an offence specified in § 12 (6) (a) of, and in the Third Schedule to The Aliens Order, 1920, and was sentenced by the said Court (to be committed to one of His Majesty's prisons to be detained there for the space of

[or otherwise as the case may be])

(and) *[if such be the case]* (that the said Court recommended that a Deportation Order should be made in the case of the said A. B. (in addition to the said sentence) or (in lieu of sentence)) :

And that the case having been brought before this Court on appeal against the said conviction ^{and} sentence, the Court on the _{or} date above mentioned affirmed the said conviction (and sentence) or (but altered the sentence to one of *[as the case may be]*).

And the Court recommend that a Deportation Order be made in the case of the said A. B. (in addition to the said sentence) or (in lieu of sentence).

(Signature of the Judge or Judges.)

SCHEDULE

(As in Form No. (1) hereof)

-
- (4) Certificate by a Court of Summary Jurisdiction with a view to a Deportation Order

(§ 12 (6) (b))

In the _____ Court of _____ held at
 on the _____ day of _____
 and _____ nineteen hundred

Before

C. D. (designation) having instituted a Complaint that A. B., an Alien to whom the particulars shown in the Schedule hereto relate, last entered the United Kingdom within twelve months before the proceedings were taken, and that he has

either

(within three months from the time at which proceedings were commenced been in receipt of parochial relief)

or

(within three months from the time at which proceedings were commenced been found wandering without ostensible means of subsistence)

or

(has been sentenced in a foreign country for an extradition crime within the meaning of the Extradition Acts, 1870 to 1906, viz. [*as the case may be*]).

On hearing the said Complaint, I (*or We*), being satisfied that the said A. B. is an Alien, hereby certify that the said A. B. last entered the United Kingdom within twelve months before these proceedings were taken, and that he

(Here insert the clause of the Complaint of which the Court was satisfied.)

(Signature of the Judge or Judges.)

SCHEDULE

Name

Nationality

Age

Dependents (if any)

Date of last entry to the United Kingdom

Facts of Complaint certified

Prison to which committed

Parish and County, or Burgh, in
which proceedings taken

(Signature of Judge or Judges.)

(5) Certificate where on conviction a Court of First Instance has made a recommendation for a Deportation Order, and on the case being brought before a Higher Court on Appeal, that Court does not concur in the recommendation.

(§ 12 (7))

In the
on the

Court of
day of

held at
nineteen hundred and

Before

I (*or* We) hereby certify that A. B., to whom the particulars shown in the annexed Schedule relate, having been found to be an Alien, was on the day of nineteen hundred and convicted before the Court of held at of the offence shown in the said Schedule, being an offence specified in § 12 (6) (*a*) of, and in the Third Schedule to The Aliens Order, 1920, and was sentenced by the said Court (to be committed to one of His Majesty's prisons to be detained there for the space of [*or otherwise as the case may be*]) and that the said Court recommended that a Deportation Order should be made in the case of the said A. B. (in addition to the said sentence) *or* (in lieu of sentence) :

And that the case having been brought before this Court on Appeal from the said conviction $\frac{\text{and}}{\text{or}}$ sentence, the Court on the date above mentioned

either

(affirmed the said conviction (and sentence) *or* (but altered the said sentence to one of—[*as the case may be*])—BUT DID NOT CONCUR in the said recommendation that a Deportation Order should be made as above mentioned in the case of the said A. B.)

or

(quashed the said conviction (and sentence) AND DID NOT CONCUR in the said recommendation that a Deportation Order should be made as above mentioned in the case of the said A. B.).

(Signature of the Judge or Judges.)

SCHEDULE

(As in Form No. (1) hereof)

J. A. CLYDE, *I.P.D.*

ACT OF ADJOURNAL

RELATIVE TO THE CRIMINAL APPEAL (SCOTLAND) ACT,
1926, 16 AND 17 GEO. V. CAP. 15

*At Edinburgh, the Twenty-seventh day of October
Nineteen hundred and twenty-six*

Present :—

THE RIGHT HONOURABLE THE LORD JUSTICE-GENERAL.
THE RIGHT HONOURABLE THE LORD JUSTICE-CLERK.
THE HONOURABLE LORD ORMDALE.
THE HONOURABLE LORD HUNTER.

THE HONOURABLE LORD ANDERSON.

THE HONOURABLE LORD SANDS.

THE HONOURABLE LORD BLACKBURN.

THE HONOURABLE LORD ASHMORE, and

THE HONOURABLE LORD FLEMING.

The Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary, by virtue of the powers conferred upon the Court by the Criminal Appeal (Scotland) Act, 1926, hereinafter referred to as the Act, and, in particular, by § 15 thereof, do hereby ENACT and DECLARE as follows :—

1. The Clerk of Justiciary is hereinafter referred to as “the Clerk,” and this expression shall mean and include the Principal and Assistant Clerks of Justiciary and any person duly authorised to perform the duties of Principal Clerk or Assistant Clerk of Justiciary.

2. (a) Notes of (1) Appeal against conviction or sentence ; (2) Application for leave to Appeal against conviction or sentence ; and (3) Application for extension of time within which, under the Act, Notes of Appeal or Application for leave to Appeal shall be given, shall be wholly or partly written, typed, or printed, and shall be signed by the appellant or applicant or his Counsel or Agent. Said Notes, which may be in the Forms I.-VI. contained in the Schedule hereto, shall, save as is hereinafter provided, be lodged with the Clerk within the prescribed period for Appeal or Application for leave to Appeal or any extension thereof granted by the Court, and the appellant or applicant shall immediately after lodging a Note of Appeal, a Note of Application for leave to Appeal or a Note of Application for extension of time as aforesaid, send a copy of the Note lodged to the Crown Agent, and also, if the Court of Trial was a Sheriff Court, to the Clerk of that Court.

(b) Where, on the trial of a person entitled to Appeal or make Application for leave to Appeal under the Act, a plea of insanity in bar of conviction has not been affirmed by the Jury, any Note required by this Act of Adjournal to be signed by the appellant or applicant himself may be signed by his Counsel or Agent, or other person authorised to act on his behalf, and may be lodged with the Clerk by such Agent or other person authorised as aforesaid.

(c) On an Appeal being lodged and on an Application for leave to Appeal being granted, the Clerk shall give notice to the Prison Commissioners for Scotland.

(d) In the case of an Appeal or Application for leave to Appeal against a conviction obtained or sentence pronounced in a Sheriff Court, the Clerk of the Court of Trial shall furnish to the Clerk a certified copy of the proceedings at the trial, or shall forward to him

the original record of the proceedings, as may be required by the Clerk.

(e) Where the Court has, on a Note of Application for leave to Appeal, given an applicant leave to appeal, it shall not be necessary for such applicant to lodge any Note of Appeal, but the Note of Application for leave to Appeal shall in such case be deemed to be a Note of Appeal.

3. (a) The shorthand writer shall sign the shorthand notes taken by him of any trial or proceeding and certify the same to be complete and correct shorthand notes thereof, and shall retain the same unless and until he is directed by the Clerk to forward a transcript of such shorthand notes to him.

(b) The shorthand writer shall, on being directed by the Clerk, furnish to him for the use of the Court a transcript of the whole or of any part of the shorthand notes taken by him of any trial or proceeding in reference to which an appellant has appealed under the Act.

(c) The shorthand writer shall also furnish to a party interested in a trial or other proceeding in relation to which a person may appeal under the Act, and to no other person, a transcript of the whole, or of any part of the shorthand notes of any such trial or other proceeding, on payment by such party interested to such shorthand writer of his charges on such scale as the Treasury may fix.

(d) A party interested in an Appeal under the Act may obtain from the Clerk a copy of any documentary production lodged by or for any other party to the Appeal, upon payment therefor of the charges thereof on the scale referred to in the preceding sub-section.

(e) For the purposes of this section, "a party interested" shall mean the prosecutor or the person convicted or any other person named in, or immediately affected by, any order made by the judge of the Court of Trial, or other person authorised to act on behalf of a party interested, as herein defined.

(f) Whenever a transcript of the whole or of any part of such shorthand notes is required for the use of the Court, such transcript may be made by the shorthand writer who took and certified the shorthand notes or by such other competent person as the Clerk may direct.

(g) A transcript of the whole or any part of the shorthand notes relating to the case of any appellant which may be required for the use of the Court shall be typewritten and certified by the person making the same to be a correct and complete transcript of the whole or of such part, as the case may be, of the shorthand notes purporting to have been taken, signed and certified by the shorthand writer who took the same.

(h) For the purpose of § 11 of the Act, the expression "pro-

ceedings at the trial" shall mean the decision of the Court on any objections to the relevancy of the indictment and in reference to any challenge of jurors, the evidence led at the trial and any objections taken in the course thereof with the decision of the Court thereon, any statement made by the prisoner, the summing up, verdict of the Jury and sentence of the Judge of the Court of Trial, but, unless otherwise ordered by such Judge, shall not include any part of the speeches of Counsel or Agent.

4. (a) The certificate of the Judge of the Court of Trial that the case is a fit case for appeal may be in terms of Form VII. of the Schedule.

(b) The Judge of the Court of Trial may, in any case in which he considers it desirable to do so, inform the person convicted before or sentenced by him that the case is, in his opinion, one fit for an appeal to the Court under § 1 (b) of the Act, and may give to such person a certificate to that effect.

5. (a) Where a person has, on his conviction on indictment, been sentenced to payment of a fine, and, in default of payment to imprisonment, the person lawfully authorised to receive such fine shall, on receiving the same, retain it until the determination of any appeal in relation thereto.

(b) If a person sentenced to payment of a fine remains in custody in default of payment of the fine he shall be deemed, for all purposes of the Act or of this Act of Adjournal, to be a person sentenced to imprisonment.

(c) Where any person has been convicted on indictment and is thereupon sentenced to the payment of a fine, and, in default of such payment, to imprisonment, and he intimates to the Judge of the Court of Trial that he is desirous of appealing against his conviction to the Court, either upon grounds of law alone, or with the Certificate of the Judge of the Court of Trial upon any grounds mentioned in § 1 (b) of the Act, such Judge may, by order entered on the Record, appoint such person forthwith to find caution for such sum as such Judge may think right, to prosecute his appeal; and, subject thereto, may also so order that payment of the said fine shall be made at the final determination of the appeal, if the same be dismissed, to the Clerk of the Court of Trial or otherwise as the Court may then order.

(d) An appellant who has been sentenced to the payment of a fine, and has paid the same in accordance with such sentence, shall, in the event of his appeal being successful, be entitled, subject to any order of the Court, to the return of the sum or any part thereof so paid by him.

(e) If an appellant to whom sub-section (c) of this Section applies

does not pay the fine or lodge a Note of Appeal upon grounds of law alone, or with the Certificate of the Judge of the Court of Trial upon any grounds mentioned in § 1 (b) of the Act, within ten days from the date of his conviction and sentence, the Clerk shall report such omission to the Court or any Judge thereof, who, after such notice as they or he may deem advisable, may find that the foresaid caution has been forfeited, and may pronounce against the Cautioner, decree for such sum as they or he may think proper, and may issue a warrant for the apprehension of the appellant and may commit him to prison in default of payment of his fine, or may make such other order as they or he may think right.

6. (a) All documents and other productions produced at the trial of a person convicted on indictment shall be kept for the period of ten days after the actual day on which such conviction took place in the custody of the Court of Trial in such manner as it may direct, and, failing direction, such custody shall be in the hands of the Sheriff Clerk of the District of the Court of the second diet to whom the Clerk of Court shall hand them over at the close of the trial, unless otherwise ordered by the Court on a Note of Appeal or Application for leave to Appeal being lodged, and if within such period of ten days or any extension thereof authorised by the Court a Note of Appeal or of Application for leave to Appeal has been lodged under the Act, they shall be so kept until the determination thereof: provided that the Judge of the Court of Trial may, on cause shown, grant an order authorising any of such documents or productions to be released, on such conditions as to custody and return, as he may deem it proper to prescribe.

(b) All such documents or other productions so retained in custody or released and returned shall, under supervision of the custodian thereof, be made available for inspection and for the purpose of making copies of documents or productions to an appellant or applicant who has lodged a Note of Appeal or of Application for leave to Appeal or to his Counsel or Agent, and to the Crown Agent and the Procurator-Fiscal or his Deputes.

(c) In case no Note of Appeal or Application for leave to Appeal is lodged within such period of ten days or extension thereof as aforesaid, all such documents and productions shall be dealt with as they are in use to be dealt with according to the existing law and practice at the conclusion of a trial.

7. (a) Where, upon conviction on indictment of any person of any offence, any disqualification, forfeiture or disability attaches to such person by reason of such conviction, such disqualification, forfeiture or disability shall not attach for the period of ten days from the date of the verdict against such person nor, in the event

of a Note of Appeal or of Application for leave to Appeal being lodged under the Act, until the determination thereof.

(b) Where, upon a conviction on indictment, any property, matters, or things the subject of the prosecution or connected therewith, are to be or may be ordered to be destroyed or forfeited, the destruction or forfeiture or the operation of any order for destruction or forfeiture thereof shall be suspended for the period of ten days after the date of the verdict in the trial, and, in the event of a Note of Appeal or of Application for leave to Appeal being lodged under the Act, shall be further suspended until the determination thereof.

8. No extract conviction of any person convicted on indictment shall be issued during the period of ten days after the actual day on which such conviction took place save in so far as the same may be required as a warrant for the detention of the person convicted under any sentence which shall have been pronounced against him nor, in the event of a Note of Appeal or of Application for leave to Appeal being lodged under the Act, until the determination thereof.

9. The Clerk, when he has received a Note of Appeal, or a Note of Application for leave to Appeal, or a Note of Application for extension of time as aforesaid, or when the Secretary of State for Scotland shall exercise his powers under § 16 of the Act, shall request the Judge of the Court of Trial to furnish him with a copy of his notes of the proceedings at the trial, certified by him, and such Judge of the Court of Trial shall thereupon furnish the same to the Clerk in accordance with such request, the Court or any Judge thereof, if they or he see fit, may order the said notes to be printed or typed for the use of the Court and the parties.

10. (a) When the Clerk has received a Note of Appeal or of Application for leave to Appeal or for extension of time as aforesaid, or when the Secretary of State for Scotland shall exercise his powers under § 16 of the Act, he shall request the Judge of the Court of Trial to furnish him with a Report in writing, giving his opinion upon the case generally, or upon any point arising upon the case of the appellant or applicant, and the Judge of the Court of Trial shall furnish the same to the Clerk in accordance with such request. When making a request for such Report the Clerk shall send to the Judge of the Court of Trial a copy of the Note of Appeal or Note of Application for leave to Appeal or Note of Application for extension of time as aforesaid, or any other document or information which he shall consider material or which the Court at any time shall direct him to send or with which such Judge may request to be furnished, to enable such Judge to deal in his Report with the appellant's or applicant's case generally or with any point arising thereon.

(b) The Report of the Judge shall be made to the Court, and, except by leave of the Court or a Judge thereof, the Clerk shall not furnish to any person any part thereof.

11. (a) When the Court fixes the date for the hearing of an Appeal, or of an Application for leave to Appeal or for extension of time for lodging Notes of Appeal or of Application for leave to Appeal which it is proposed to dispose of by the Court, the Clerk shall give notice to the Crown Agent and to the Agent of the appellant or applicant, or to the appellant or applicant himself if he have no known Agent, and the latter shall thereupon lodge three copies (typed or printed) of the said Appeal or Application for the use of the Court.

(b) Where it is proposed that the powers of the Court shall be exercised by a single Judge under the provisions of § 14, one copy only of the Application to be disposed of shall be lodged by the Agent of the applicant for the use of the Judge.

12. (a) If an appellant or an applicant for leave to Appeal desires to present his case and his argument in writing instead of orally he shall intimate this desire to the Clerk at least four days before the diet fixed for the hearing of the Appeal or Application for leave to Appeal, and, at the same time, shall lodge with the Clerk three copies of his case and argument ; at the same time, he shall also send a copy thereof to the Crown Agent.

(b) Unless the Court shall otherwise direct, the respondent, in a case to which this Section applies, shall not make a written reply to the case and argument in writing, but shall reply orally thereto at the diet fixed for the hearing of the Appeal or Application for leave to Appeal.

(c) Unless the Court shall otherwise allow, an appellant or an applicant for leave to Appeal who has presented his case and argument in writing shall not be entitled to submit in addition an oral argument to the Court in support of the Appeal or Application for leave to Appeal.

13. (a) An appellant or applicant at any time after he has lodged a Note of Appeal or of Application for leave to Appeal, or of Application for extension of time as aforesaid, may abandon his Appeal or Application by lodging with the Clerk notice of abandonment thereof, which may be in terms of Form VIII. of the Schedule, and on such notice being lodged the Appeal or Application shall be deemed to have been dismissed by the Court.

(b) Where no appearance is made by or on behalf of an appellant or applicant at the diet appointed for the hearing of an Appeal or

Application for leave to Appeal and where no case or argument in writing has been timeously lodged, the Court shall dispose of the Appeal or Application for leave to Appeal as if it had been abandoned by the appellant.

14. (a) When an Application or Applications have been dealt with by a Judge of the Court, under § 14 of the Act, the Clerk shall notify to the applicant the decision in terms of Form IX. of the Schedule. In the event of such Judge refusing all or any of such Applications, the Clerk on notifying such refusal to the applicant shall forward to him Form X. of the Schedule hereto, which Form the applicant shall fill up and forthwith return to the Clerk. If the applicant does not desire to have his said Application or Applications determined by the Court as fully constituted for the hearing of Appeals under the Act, or does not return within five days to the Clerk Form X. duly filled up by him, the refusal of his Application or Applications by such Judge shall be final. If the applicant desires that his said Application or Applications shall be determined by the Court as fully constituted for the hearing of Appeals under the Act and is not legally represented, he may be present at the hearing and determination by the Court of his said Application ; provided that an applicant who is legally represented shall not be entitled to be present without leave of the Court.

When an applicant duly fills up and returns within the prescribed time to the Clerk Form X. expressing a desire to be present at the hearing and determination by the Court of the Applications mentioned in this Section, such Form shall be deemed to be an Application by the applicant for leave to be so present, and the Clerk, on receiving the said Form, shall take the necessary steps for placing the said Application before the Court. If the said Application to be present is refused by the Court, the Clerk shall notify the applicant ; and if the said Application is granted, the Clerk shall notify the applicant and the Governor of the Prison wherein the applicant is in custody and the Prison Commissioners for Scotland. For the purpose of constituting a Court of Appeal the Judge who has refused any such Application may sit as a member of such Court, and take part in determining such Application.

(b) A Judge of the Court sitting under the provisions of § 14 of the Act may sit and act wherever convenient.

15. (a) The evidence of any witnesses ordered to be examined before the Court or before any Judge of the Court or other person appointed by the Court shall be taken in accordance with the existing law and practice as to the taking of evidence in criminal trials in Scotland. The appellant or applicant and the respondent or Counsel on their behalf shall be entitled to be present at and

take part in any examination of any witness to which this Section relates.

(b) When an Order of Reference is made by the Court under § 6 (d) of the Act, the question to be referred and the person to whom as Special Commissioner the same shall be referred shall be specified in such Order. The Court may in such Order, or by giving directions as and when they from time to time shall think right, specify whether the appellant or respondent or any person on their behalf may be present at any examination or investigation or at any stage thereof as may be ordered under § 6 (d) of the Act, and specify any and what powers of the Court may be delegated to such Special Commissioner, and may require him from time to time to make *interim* Reports to the Court upon the question referred to him, and may, if the appellant is in custody, give leave to him to be present at any stage of such examination or investigation, and may give directions to the Clerk that any Report made by such Special Commissioner shall be made available to the appellant and respondent or to Counsel or Agent on their behalf, and that they shall be entitled to have copies thereof made if they so desire.

16. The Court or any single Judge exercising the powers of the Court under § 14 of the Act may continue the hearing of any Appeal or Application to a date, fixed or not fixed, and any Judge of the Court, or other person appointed by the Court to take additional evidence, may fix any diet of proof necessary for that purpose.

17. When an appellant or applicant is entitled or has been granted leave to be present at any diet (1) before the Court or any Judge thereof, or (2) for the taking of additional evidence before a person appointed for the purpose under § 6 (b) of the Act, or (3) for an examination or investigation by a Special Commissioner in terms of § 6 (d) of the Act, the Clerk shall give timeous notice to the Prison Commissioners for Scotland, in terms of Form XI. of the Schedule, which notice shall be sufficient warrant to the said Commissioners for transmitting the appellant or applicant in custody from prison to the place where said diet or any subsequent diets are to be held and for reconveying him to prison at the conclusion of the said diet and any subsequent diets. The appellant or applicant shall appear at all such diets in ordinary civilian clothes.

18. The Prison Commissioners for Scotland shall, on notice under the preceding Section from the Clerk, cause from time to time such sufficient number of male and female warders to attend the Sittings of the Court as, having regard to the list of Appeals thereat, they shall consider necessary.

19. (a) On the final determination of any Appeal under the Act or of any matter under § 14 of the Act the Clerk shall give notice of such determination to the appellant or applicant if he is in custody and has not been present at such final determination, to the Clerk of the Court of Trial, and to the Prison Commissioners for Scotland.

(b) In any case of an Appeal or Application for leave to Appeal in relation to a conviction involving sentence of death the Clerk shall, on receiving the Note of Appeal or of Application for leave to Appeal, send a copy thereof to the Secretary of State for Scotland and to the Sheriff or Chief Magistrate of any Burgh charged with the Execution of said sentence, and, on the final determination of any such Appeal or Application by the Court, shall forthwith notify the appellant or applicant, the Secretary of State for Scotland, the said Sheriff or Chief Magistrate, and the Prison Commissioners for Scotland thereof.

(c) The Clerk shall in all cases of Appeal or of Application for leave to Appeal from a conviction obtained or sentence pronounced in the High Court of Justiciary, note on the margin of the record of the trial the fact of an Appeal or Application for leave to Appeal having been taken and the result of the Appeal or Application for leave to Appeal, and, in the case of an Appeal or Application for leave to Appeal taken against any conviction obtained or sentence pronounced in the Sheriff Court, the Clerk shall notify the Clerk of the Court of Trial of the result of said Appeal or Application, and it shall be the duty of the Clerk of the Court of Trial to enter on the margin of the record of the trial a note of such result.

20. (a) The Clerk shall keep a Register, in such form as he thinks right, of all cases in which he shall receive a Note of Appeal or Note of Application for leave to Appeal under the Act, which Register shall be open for public inspection at such place and at such hours as the Clerk, subject to the approval of the Court, shall consider convenient.

(b) The Clerk shall also take the necessary steps for preparing, from time to time, a list of cases to be dealt with by the Court, and shall cause such list to be published in such manner as, subject to the approval of the Court, he shall think convenient for giving due notice to any parties interested, of the hearing of such cases by the Court.

(c) Where an appellant or applicant is in custody and has obtained leave or is entitled to be present at the hearing and determination of his Appeal or Application, the Clerk shall notify the appellant or applicant, the Governor of the Prison in which the appellant or applicant then is, and the Prison Commissioners for Scotland of the probable day on which the Appeal or Application will be heard.

The Prison Commissioners for Scotland shall take steps to transfer the appellant or applicant to a Prison convenient for his appearance before the Court, at such reasonable time before the hearing as shall enable him to consult his legal adviser, if any.

21. (a) Except where otherwise provided in this Act of Adjournal, any application to the Court may be made by the appellant or respondent as the case may be or by Counsel on his behalf, orally or in writing, but in regard to such applications if the appellant is unrepresented and is in custody and is not entitled or has not obtained leave to be present before the Court, he shall make any such application by forwarding the same in writing to the Clerk, who shall take the proper steps to obtain the decision of the Court thereon.

(b) In all proceedings before a Judge under § 14 of the Act, and in all preliminary and interlocutory proceedings and applications except such as are heard before the full Court, the parties thereto may be represented and appear by an Agent alone.

22. Subject to the provisions of § 14 of the Act and without prejudice thereto, preliminary and interlocutory proceedings incidental to any appeal or application may be disposed of by a single Judge.

23. When the Court has heard and dealt with any Application under the Act or this Act of Adjournal, the Clerk shall (unless it appears to him unnecessary so to do) give to the applicant (if he is in custody and has not been present at the hearing of such Application) notice of the decision of the Court in relation to the said Application.

24. Non-compliance with the provisions of this Act of Adjournal, or with any rule of practice for the time being in force under the Act, shall not prevent the further prosecution of an Appeal or Application if the Court or a Judge thereof consider it just and proper that such non-compliance be waived or remedied by amendment or otherwise. The Court or a Judge thereof may, in such manner as they or he think right, direct the remedy of such non-compliance, and upon the same being remedied accordingly the Appeal or Application shall proceed.

25. Sittings of the Court (including Sittings in Court of Session Vacation and Sittings of a Judge of the Court under § 14 of the Act) shall be arranged to be held as may from time to time be directed by the Lord Justice-General whom failing by the Lord Justice-Clerk.

26. Save in so far as herein provided for no Clerk's fees, Court fees, or other fees or expenses shall be exigible from or awarded against an appellant or applicant in respect of an Appeal or Application under the Act.

27. In computing the period of days in appeals and other applications under the Act and this Act of Adjournal, Sundays and public holidays shall not be included.

28. The Clerk may, with the sanction of the Lord Justice-General and the Lord Justice-Clerk, vary the forms appended to this Act from time to time as may be found necessary for giving effect to the provisions of the Act.

29. This Act of Adjournal shall come into operation on the first day of November 1926, and shall be printed and published in the *Edinburgh Gazette*.

J. A. CLYDE, *I.P.D.*

SCHEDULE

FORM I.—NOTE OF APPEAL

Question of law only

Criminal Appeal (Scotland) Act, 1926

*Unto the Right Honourable the Lord Justice-General, Lord
Justice-Clerk, and Lords Commissioners of Justiciary*

The Appeal of....., Name.
presently prisoner in the Prison of.....
[or, now residing at.....], *Appellant*; Strike out who is unnecessary.
against The Right Honourable
His Majesty's Advocate, *Respondent*.
Humbly Sheweth,
That at the.....Court, on the
.....day of....., the appellant
was convicted of State crime or offence.

and sentenced to

The appellant appeals against the said conviction for the following reasons :—

Here state
shortly the
reasons of
the Appeal.

According to Justice, etc.,

(Signature).....

Date.....19.....

Note.—State whether appellant desires to be present on the hearing of the Appeal :—

Strike out what
is unnecessary.

The appellant does [not] desire to be present.

(Signature).....

FORM II.—NOTE OF APPEAL UPON THE CERTIFICATE OF THE JUDGE OF THE COURT OF TRIAL

Criminal Appeal (Scotland) Act, 1926

*Unto the Right Honourable the Lord Justice-General, Lord
Justice-Clerk, and Lords Commissioners of Justiciary*

Name.

The Appeal of.....,
presently prisoner in the Prison of.....
[or, now residing at.....], *Appellant* ;
against The Right Honourable
His Majesty's Advocate, *Respondent*.
Humbly Sheweth,

That at the.....Court, on the
.....day of.....19....., the
appellant was convicted of

State crime or
offence.

That the appellant duly obtained a Certificate which is [hereto
annexed] [or, herewith enclosed] from the Judge before whom he
was tried and convicted that it is a fit case for Appeal.

Strike out what
is unnecessary.

The appellant appeals against the said conviction for the following reasons :—

Here state
shortly the
reasons of the
Appeal.

According to Justice, etc.,

(Signature).....

Date.....19.....

Note.—State whether the appellant desires to be present on the hearing of the Appeal.

Strike out what
is unnecessary.

The appellant does [not] desire to be present.

(Signature).....

FORM III.—NOTE OF APPLICATION, UNDER SECTION 1 (b), FOR
LEAVE TO APPEAL AGAINST A CONVICTION

Criminal Appeal (Scotland) Act, 1926

*Unto the Right Honourable the Lord Justice-General, Lord
Justice-Clerk, and Lords Commissioners of Justiciary*

The Application of....., Name.
presently prisoner in the Prison of.....
[or, now residing at.....], *Appellant*; Strike out what
against The Right Honourable is unnecessary.
His Majesty's Advocate, *Respondent*.

Humbly Sheweth,

That at the.....Court, on the
.....day of.....19....., the
applicant was convicted of State crime or
offence.

That the applicant being desirous of appealing against the said
conviction applies to the High Court of Justiciary for leave to appeal
against the same, for the following reasons :—

Here state
shortly the
reasons of the
Application.

According to Justice, etc.,

(*Signature*).....

Date.....19.....

Note.—State whether the applicant desires to be present on the
hearing (a) of the Application and (b) of the Appeal if leave be
granted.

The applicant (does not) desire(s) to be present on the hearing— Strike out what
(a) of the Application, and is unnecessary.
(b) of the Appeal if leave be granted.

(*Signature*).....

FORM IV.—NOTE OF APPLICATION FOR LEAVE TO APPEAL
AGAINST SENTENCE

Criminal Appeal (Scotland) Act, 1926

*Unto the Right Honourable the Lord Justice-General, Lord
Justice-Clerk, and Lords Commissioners of Justiciary*

The Application of....., Name.
presently prisoner in the Prison of.....

Strike out what is unnecessary. [or, now residing at.....], *Appellant* ;
 against The Right Honourable.....,
 His Majesty's Advocate, *Respondent*.

Humbly Sheweth,

That at the.....Court, on the
day of.....19....., the

State crime or offence.

applicant was convicted of

State sentence.

and sentenced to

That the applicant being desirous of appealing against the said sentence applies to the High Court of Justiciary for leave to appeal against the same for the following reasons :—

Here state shortly the reasons of the Application.

According to Justice, etc.,

(Signature).....

Date.....19.....

Note.—State whether the applicant desires to be present on the hearing—

(a) of the Application and

(b) of the Appeal if leave be granted.

Strike out what is unnecessary.

The applicant does [not] desire to be present on the hearing—

(a) of the Application and

(b) of the Appeal if leave be granted.

(Signature).....

FORM V.—NOTE OF APPEAL UNDER THE CRIMINAL APPEAL (SCOTLAND) ACT, 1926, SECTION 1 (c), AGAINST SENTENCE OF PREVENTIVE DETENTION UNDER THE PREVENTION OF CRIME ACT, 1908.

Unto the Right Honourable the Lord Justice-General, Lord Justice-Clerk, and Lords Commissioner of Justiciary

Name.

The Appeal of.....,
 presently prisoner in the Prison of.....

Strike out what is unnecessary.

[or, now residing at.....], *Appellant* ;
 against The Right Honourable
 His Majesty's Advocate, *Respondent*.

Humbly Sheweth,

That at the.....Court, on the
day of.....the appellant
 was found guilty of being a habitual criminal, and sentenced to
 preventive detention for a period of....years

That the appellant appeals against the said sentence for the following reasons :—

Here state
shortly the
reasons of the
Appeal.

According to Justice, etc.,

(Signature).....

Date.....19.....

Note.—State whether the appellant desires to be present on the hearing of the Appeal.

The appellant does [not] desire to be present on the hearing of the Appeal. Strike out what
is unnecessary.

(Signature).....

FORM VI.—NOTE OF APPLICATION FOR EXTENSION OF
TIME WITHIN WHICH TO APPEAL

Criminal Appeal (Scotland) Act, 1926

*Unto the Right Honourable the Lord Justice-General, Lord
Justice-Clerk, and Lords Commissioners of Justiciary*

The Application of....., Name
presently prisoner in the Prison of.....
[or, now residing at.....], *Appellant* ; Strike out what
is unnecessary.
against The Right Honourable
His Majesty's Advocate, *Respondent*.

Humbly Sheweth,

That at the.....Court, on the
.....day of.....19....., the
applicant was convicted of

State crime or
offence.

and sentenced to

State sentence.

That the applicant hereby applies to the High Court of Justiciary for an extension of the time within which he may lodge a Note of Appeal (*or*, Note of Application for leave to Appeal), for the following reasons :—

Here state
shortly the
reasons of the
Application.

According to Justice, etc.,

(Signature).....

Date.....19.....

FORM VII.—JUDGE’S CERTIFICATE

Criminal Appeal (Scotland) Act, 1926

Strike out what is not applicable. At a Sitting of the High Court of Justiciary [*or*, of a Sheriff and Jury Court] held at.....on the..... day of.....

His Majesty’s Advocate v.

Name. Whereas the said..... was tried before me in the said Court on the.....day of 19....., on indictment and convicted of

State crime or offence.

and was thereupon sentenced by me to

State sentence.

I do hereby certify that the case is a fit case for an Appeal by the said to the High Court of Justiciary under § 1 (*b*) of the Criminal Appeal (Scotland) Act, 1926, upon the following grounds :—

State the grounds in general terms.

(*Signature*).....

Dated this.....day of.....

FORM VIII.—NOTE OF ABANDONMENT

Criminal Appeal (Scotland) Act, 1926

His Majesty’s Advocate v.

Name. I, ... presently prisoner in the Prison of.....
Strike out what is unnecessary. [*or*, now residing at.....],
having been convicted of.....
State crime or offence. in the.....Court of.....at..... on the.....day of and having been desirous of appealing [*or*, of making Application for leave to Appeal] and having duly lodged a Note to that effect with the Clerk of Justiciary against my said conviction [*or*, the sentence of.....passed upon me on my said conviction],
Strike out what is unnecessary. do hereby give you notice that I do not intend further to prosecute

my appeal [*or*, Application for leave to Appeal], but that I hereby abandon all further proceedings in regard thereto as from the date hereof.

(*Signature*).....

Witness

Dated this.....day of.....

TO THE CLERK OF JUSTICIARY,
Parliament Square,
Edinburgh.

FORM IX.—NOTIFICATION TO APPLICANT OF JUDGE'S
DECISION UNDER SECTION 14

Criminal Appeal (Scotland) Act, 1926

His Majesty's Advocate v.

Name.

I hereby give you notice that a Judge of the High Court of Justiciary having considered your Application for :—

- (a) Leave to Appeal ;
- (b) Extension of time within which a Note of Appeal or of Application for leave to Appeal may be lodged ;
- (c) Permission to you to be present at the hearing of any proceedings in relation to your Appeal [*or* Application] ;
- (d) Admission to bail ;

has refused the Application marked
(and has granted your Application marked.....).

If you desire to have the above-mentioned Applications which have been refused determined by the High Court of Justiciary constituted as provided in the Act above mentioned, you are required to fill up the enclosed Form and return it to me forthwith.

Dated this.....day of.....

.....
Clerk of Justiciary.

To the above-named

FORM X. -NOTIFICATION FOR DETERMINATION BY THE COURT UNDER
SECTION 14 OF APPLICATION(S) REFUSED BY A SINGLE JUDGE

Criminal Appeal (Scotland) Act, 1926

Name.

His Majesty's Advocate v.

I,....., having
received your notification that my Applications for :—

(a) Leave to Appeal ;

(b) Extension of time within which a Note of Appeal or Applica-
tion for leave to Appeal may be lodged ;

(c) Permission to me to be present at the hearing of any pro-
ceedings in relation to my Appeal [*or Application*] :

(d) Admission to bail ;

have been refused ; do hereby give you notice that I desire that the
said Applications shall be considered and determined by the High
Court of Justiciary constituted as provided in the Act above
mentioned [and that as I am not legally represented I desire to be
present at the determination of my said Applications].

Strike out what
is inapplicable.

Strike out this
if you do not
desire to be
present.

(*Signature*).....

Appellant.

Dated this.....day of.....

TO THE CLERK OF JUSTICIARY,
Parliament Square,
Edinburgh.

FORM XI.—WARRANT FOR TRANSMISSION OF PRISONER

Criminal Appeal (Scotland) Act, 1926

In the matter of the Appeal (*or Application*) by.....,
prisoner in the Prison of....., Appellant (*or*
Applicant), against The Right Honourable.....,
His Majesty's Advocate, *Respondent*.

High Court of Justiciary

To the Prison Commissioners for Scotland.

Take notice that the Court has fixed the.....day of
....., at.....o'clock, as a diet
for

State the pur-
pose of the
diet.

Warrant is hereby granted, and you are hereby required to
transmit.....appellant [*or applicant*],
in custody from the Prison wherein he is presently confined to the

above-mentioned diet, to be held in the..... State place.
for the diet for the purpose foresaid.....and any
subsequent diets thereof, and to reconvey him to prison at the
conclusion of the said diet and any subsequent diets.

.....
Clerk of Justiciary.

Date.....

FORM XII

BAIL

Unto the Right Honourable The Lord
Justice-General, Lord Justice-Clerk, and
Lords Commissioners of Justiciary.

The PETITION of
presently a prisoner in the Prison of.....

Humbly Sheweth,

That on the.....day of.....19....
he was convicted in the.....Court
of.....at....., of.....
....., and sentenced to.....
.....

State crime or
offence.

That on.....he lodged an

to the High Court of Justiciary under the Criminal Appeal (Scotland)
Act, 1926.

Here state any
relevant facts.

That the said crime is bailable.

May it therefore please your Lordships to Grant Warrant for
the interim liberation of the petitioner so far as detained
under said sentence on his finding Bail to the satisfaction
of the Clerk of Court to such amount as your Lordships shall
fix.

According to Justice, etc.,

(Signature).....

Date.....

J. A. CLYDE, I.P.D.

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